

The Constitutional Rights of Unwed Fathers Before and After *Lehr v. Robertson*

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I. INTRODUCTION

In *Lehr v. Robertson*¹ the United States Supreme Court brought to an end the legal dispute over a New York judge's order that a little girl named Jessica be adopted by her stepfather, Richard Robertson. The order was entered on March 7, 1979, in response to an adoption petition filed by Mr. Robertson and his wife, Lorraine, who was Jessica's natural mother.² The Robertsons were married eight months after Jessica's birth in the fall of 1976, and Jessica had been living with them for nearly two years when the adoption order was entered.³ By the time the United States Supreme Court finally validated the order, the Robertson family had been together for nearly six years.

The dispute did not concern the qualifications of Mr. Robertson as Jessica's adoptive father. Without more, the adoption would have been viewed by all concerned as merely a legal recognition of what was already a *de facto* family situation. Complications arose because the adoption that placed Mr. Robertson in the legal position of being Jessica's father⁴ also had the effect of removing from her natural father all parental responsibilities and rights regarding her.⁵ The adoption had this effect even though Jonathan Lehr, Jessica's natural father, was never notified of the adoption or shown to be unqualified to exercise parental responsibilities and rights. Mr. Lehr disputed the adoption because he believed that its effect on his relationship with Jessica required both more stringent procedures than New York provided and more substantial reasons than merely that it would be in Jessica's best interests to be adopted by Mr. Robertson.⁶

Lehr is a classic illustration of the double effect of adoption on parental interests. On the one hand, adoption legally establishes the relationship of parent and child for the adopting parents.⁷ On the other hand, adoption legally terminates any relationship that may have existed between the child and her natural parent or parents just before the adoption.⁸ The underlying assumption of this double effect of adoption is that

1. 103 S. Ct. 2985 (1983).

2. *Id.* at 2987.

3. *Id.*

4. See N.Y. DOM. REL. LAW § 117(1) (McKinney 1977).

5. See *id.*, quoted in *Caban v. Mohammed*, 441 U.S. 380, 384 n.2 (1979).

6. 103 S. Ct. 2985, 2990 (1983).

7. See, e.g., ARIZ. REV. STAT. ANN. § 8-117(A) (1974), which declares:

Upon entry of the decree of adoption, the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent shall thereafter exist between the adopted person and the adoptive petitioner the same as though the child were born to the adoptive petitioner in lawful wedlock.

8. See, e.g., *id.* § 8-117(B), which declares:

Upon entry of the decree of adoption, the relationship of parent and child between the adopted person and the persons who were his parents just prior to the decree of adoption shall be completely severed and all the legal rights, privileges, duties, obligations and other legal consequences of the relationship shall cease to exist . . .

See also CAL. CIV. CODE § 229 (West 1982); TEX. FAM. CODE ANN. § 16.03(b) (Vernon Supp. 1982-1983).

Lehr illustrates the only common exception to this effect. Adoption by the spouse of a child's natural parent has no terminating effect on the relationship between that natural parent and the child. Thus, Jessica's mother was still her mother in the eyes of the law after Mr. Robertson's petition was granted. See N.Y. DOM. REL. LAW § 117 (McKinney 1977), quoted in *Caban*, 441 U.S. 380, 384 n.2 (1979); ARIZ. REV. STAT. ANN. § 8-117(B) (1974) ("[W]here the adoption is by the spouse of the child's parent, the relationship of the child to such parent shall remain unchanged by the decree of adoption.").

The New York statute at issue in *Lehr* also illustrates that some vestiges of the legal relationship between parent and

while a child may have no parents in the eyes of the law, she can never legally have more than one mother and one father.⁹ Any possible parental interests in persons other than the adopting parents must be legally eliminated before the adopting parents can assume the legal status of parents to the child.¹⁰

The general subject of this Article, like Mr. Lehr's complaint and the Court's opinion in *Lehr*, is state termination in adoption proceedings of parental interests in children.¹¹ Termination of parental interests is not always limited to situations in which the termination is necessary to free the child for adoption.¹² Because the state purposes in furtherance of which termination is decreed may have a significant effect on the way the Court views state action terminating parental interests, this Article generally will be directed at situations in which the termination is undertaken to free the child for adoption by another.¹³

Ordinarily, before the state may allow the adoption of any child, it must either obtain the consent of the child's natural parents or establish that the natural parents

child may survive adoption. N.Y. DOM. REL. LAW § 117(2) (McKinney 1977), *quoted in Caban*, 441 U.S. 380, 384 n.2 (1979) (adoption does not affect child's right to distribution of property under natural parent's will).

9. See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.1 (1968). Whether this assumption is necessary is an issue beyond the scope of this Article.

10. In *Lehr* the subject of Mr. Lehr's complaint and of the Court's opinion was the terminating effect of the adoption itself. See *supra* notes 5-8 and accompanying text. The state may legally terminate the parental interests of a parent in his or her child prior to the commencement of an adoption proceeding. In Arizona, for example, if the state establishes the grounds set out in ARIZ. REV. STAT. ANN. § 8-533 (Supp. 1974-1983), the parent and child are divested of "all legal rights, privileges, duties and obligations with respect to each other except the right of the child to inherit and support from the parent." ARIZ. REV. STAT. ANN. § 8-539 (1974) (emphasis added). See also CAL. CIV. CODE §§ 232, 232.6 (West 1982 & Supp. 1984); TEX. FAM. CODE ANN. §§ 15.02, .07 (Vernon Supp. 1982-1983). The child is then free for adoption by another without regard to the natural parent. See, e.g., ARIZ. REV. STAT. ANN. § 8-106(A)(1)(b) (Supp. 1974-1983).

The state may also disregard the interests of some parents. In Texas, for example, unwed fathers who have not been married to the child's mother or had their paternity voluntarily or involuntarily established are simply excluded from the state's definition of a "parent" who must consent to adoption in the absence of termination of his parental rights. TEX. FAM. CODE ANN. §§ 11.01(3), 12.02 (Vernon 1975 & Supp. 1982-1983). Such a father, then, need not be considered at all in the adoption process. See, e.g., *In re K*, 520 S.W.2d 424 (Tex. Civ. App. 1975), *aff'd*, 535 S.W.2d 168 (Tex.), *cert. denied*, 429 U.S. 907 (1976); *In re T. E. T.*, 603 S.W.2d 793 (Tex. 1980), *cert. denied sub nom. Oldag v. Christian Charities*, 450 U.S. 1025 (1981). See *infra* notes 487-517 and accompanying text for further discussion of the Texas scheme.

The state also may disregard the interests of some parents other than unwed fathers. See, e.g., ARIZ. REV. STAT. ANN. § 8-106(A)(1)(a) (Supp. 1974-1983) (provision for dispensing with the consent to adoption of a parent declared incompetent).

The state will ordinarily require the consent to adoption of parents whose interests are not eliminated in one of the ways discussed above. See, e.g., *id.* § 8-106(A)(1). Some states, however, have a statutory provision for dispensing with the consent of a parent whose consent would otherwise be required, if the adoption will serve the interests of the child. See, e.g., *id.* § 8-106(C). In Arizona, at least, that provision has been judicially construed to carry with it a jurisdictional requirement of a determination of the parent's incapacity, specific misconduct, or inability or unwillingness to care for the child, all conditions that demonstrate unfitness or conditions similar to the grounds that must be established under ARIZ. REV. STAT. ANN. § 8-533 (Supp. 1974-1983). *Clark v. Curran* (*In re Appeal in Pima County, Adoption of B-6355 & H-533*), 118 Ariz. 111, 115, 575 P.2d 310, 314, *cert. denied*, 439 U.S. 848 (1978); *Natural Mother v. Adopting Parents* (*In re Adoption of Baby Boy*), 106 Ariz. 195, 199, 472 P.2d 64, 68-71 (1970); *Caruso v. Superior Court*, 100 Ariz. 167, 412 P.2d 463 (1966); *Hyatt v. Hyatt* (*In re Adoption of Hyatt*), 24 Ariz. App. 170, 176, 536 P.2d 1062, 1068 (1975).

11. The concern is with terminations whose ultimate goal is adoption of children, no matter how the terminations are effected. See *supra* note 10.

12. For example, the statutory procedures for termination set out at ARIZ. REV. STAT. ANN. §§ 8-531 to -544 (1974 & Supp. 1974-1983) are not limited to situations in which adoption is the ultimate goal. See ARIZ. R. ADMIN. P. 6-5-6807 (termination appropriate to free child for adoption or to end parent-child relationships when protection of the child will result).

13. The state may have varying interests in adoption as well. If the adoption is by a stepparent spouse, as in the *Lehr* situation, the state may merely want to validate a de facto relationship. If the adoption is by a stranger, on the other hand, the state is interested in establishing new relationships for the child. See *infra* text accompanying notes 248-92 for a discussion of the impact of these different state interests.

are so unfit that legally terminating their relationship with the child or dispensing with their consent to adoption is justified.¹⁴ Because termination of parental rights permanently and irrevocably severs the parent-child relationship, it is the most serious of all state interferences between parent and child.¹⁵ Generally, American law subjects such terminations, whether effected during the adoption proceeding or before, to great restraint.¹⁶ When the parent whose relationship is to be terminated is an unwed father, however, the law has generally been much more lenient toward state efforts.¹⁷

14. See, e.g., the Arizona process set out *supra* note 10. The term "unfitness" can comprehend both fault on the part of the natural parent and incapacity unrelated to fault. See, e.g., ARIZ. REV. STAT. ANN. §§ 8-533(B)(2) (termination if parent shown to have "neglected or wilfully abused the child"), 8-533(B)(3) (termination if parent shown to be mentally ill, mentally deficient, or a chronic drug or alcohol abuser who is unable to care for the child because of the condition and likely to remain unable to care for the child) (Supp. 1974-1983). See generally H. CLARK, *supra* note 9, §§ 18.4, 18.5. Unfitness, however, presumes a condition of unwillingness or inability to care for the child without consideration of whether or not, given parental ability and willingness to provide care, the child would be better off without the relationship (the ordinary consideration under a "best interests" standard). See generally H. CLARK, *supra* note 9; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as GFS I]; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter cited as GFS II]; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removing Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975). The debate over the use of a "best interests" or a "fitness" standard may occur in the context of any kind of state intervention into a family. It is important to remember that this Article is concerned with the permanent and irrevocable termination of any relationship whatsoever between parent and child.

15. See *supra* notes 8, 10.

16. See H. CLARK, *supra* note 9, § 18.5; see also, e.g., Clark v. Curran (*In re Appeal in Pima County, Adoption of B-6355 & H-533*), 118 Ariz. 111, 575 P.2d 310, cert. denied, 439 U.S. 848 (1978); Troska v. Kekovich (*In re Adoption of Hammer*), 15 Ariz. App. 196, 487 P.2d 417 (1971); Natural Mother v. Adopting Parents (*In re Adoption of Baby Boy*), 10 Ariz. App. 47, 455 P.2d 997 (1969), vacated on other grounds, 106 Ariz. 195, 472 P.2d 64 (1970); Detrich v. Dorothy H. (*In re Jack H.*), 106 Cal. App. 3d 257, 165 Cal. Rptr. 646 (1980); Kern County Welfare Dep't v. Delores B. (*In re David B.*), 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979); Department of Adoptions v. Daniel G. (*In re George G.*), 68 Cal. App. 3d 146, 137 Cal. Rptr. 201 (1977); Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976); *In re S.D.H.*, 591 S.W.2d 637 (Tex. Civ. App. 1979); *In re R_E_W_*, 545 S.W.2d 573 (Tex. Civ. App. 1976).

17. Texas, for example, simply excludes fathers who have not been married to the child's mother or had their paternity either voluntarily or involuntarily established from the definition of "parent" in its termination and adoption statutes. TEX. FAM. CODE ANN. §§ 11.01(3), 12.02 (Vernon 1975 & Supp. 1982-1983). Thus, in Texas, such a father need not be considered at all in the adoption process because there is no parent-child relationship to be considered between him and his child. See, e.g., *In re T. E. T.*, 603 S.W.2d 793 (Tex. 1980), cert. denied sub nom. Oldag v. Christian Charities, 450 U.S. 1025 (1981); *In re K.*, 520 S.W.2d 424 (Tex. Civ. App. 1975), aff'd, 535 S.W.2d 168 (Tex.), cert. denied, 429 U.S. 907 (1976). The Texas procedure not only excludes fathers who have not established themselves as "parents" within the statutory procedure, but also apparently makes the father's voluntary establishment of a protectible interest dependent on either the mother's consent or the judge's determination that a declaration of paternity would be in the child's "best interest." TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1982-1983). See *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. Civ. App. 1982), vacated sub nom. Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983), discussed *infra* notes 487-517 and accompanying text. The Court vacated and remanded upon being informed that the father might have recourse through Texas' involuntary paternity statute, TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1982-1983). 103 S. Ct. 1760 (1983). The appellate court on rehearing, however, did not reach the question of the involuntary paternity statute's applicability because it had not been pleaded at the trial court. *In re Baby Girl S.*, 658 S.W.2d 794 (Tex. Civ. App. 1983). If an unwed father can use involuntary legitimation, he will be declared the father of the child if the finder of fact determines that he is the natural father. TEX. FAM. CODE ANN. § 13.08 (Vernon Supp. 1982-1983). The effect of that decree is "to create the parent-child relationship between the father and child as if the child were born to the father and mother during marriage." *Id.* § 13.09. Thus, the unwed father, in the absence of termination, could block the child's adoption.

Under the Uniform Parentage Act (UPA), on the other hand, a man may establish himself as the father of his child, with the right of any other parent to withhold consent to adoption in the absence of unfitness, by (1) presumption, UNIF. PARENTAGE ACT § 4 (1973); (2) adjudication, *id.* §§ 6-15; or (3) an appearance before the court in response to notification of the mother's consent to the child's adoption, a claim of custody, a determination of fitness for custody, and a declaration that he is the child's father, *id.* § 24 & commentary. In California, a state which has adopted a version of the UPA, however, only a "presumed" father has the right to veto his child's adoption by withholding consent. CAL. CIV.

Thus, many states have avoided the problem in the past by not including some or all unwed fathers in their definitions of "parents" whose consent to adoption must be obtained.¹⁸ Other states have established certain categories of "unfitness" that pertain only to unwed fathers.¹⁹ Still others provide for participation by unwed fathers in the procedures that lead to the termination of their interests in their children, but do not apply the same substantive standards to them that apply to other parents.²⁰ Last,

Code §§ 7017(a)(1), 7004(a) (West 1983), § 224 (West 1982). Thus, a man who has been adjudicated to be the child's natural father may not block the child's adoption by withholding consent as other parents may, even though he may be, for example, supporting the child.

Last, under old Arizona law, although Arizona declared all children to be the legitimate children of their natural parents, ARIZ. REV. STAT. ANN. § 8-601 (1974-1983), the consent of an unwed father who had neither acknowledged paternity in writing to the court nor been judicially decreed the father at the time of or prior to the filing of a petition for adoption was not required for the adoption of his child. Act of May 18, 1970, ch. 205, § 2, 1970 Ariz. Sess. Laws 1047, 1050 (amended 1976, deleting pertinent subsection). Under current Arizona law, the consent of any unwed father is required in the same way as the consent of any other parent. ARIZ. REV. STAT. ANN. § 8-106(A)(1) (Supp. 1974-1983).

18. See, e.g., the Texas scheme set out *supra* note 17.

19. See, e.g., TEX. FAM. CODE ANN. § 15.02(1)(H) (Vernon Supp. 1982-1983) (father who voluntarily abandons mother during her pregnancy, knowing of her pregnancy, and fails to provide support or medical care for her during the pregnancy and remains apart from the child or fails to support the child after birth is subject to termination).

20. California provides the rights of notification and opportunity for hearing to any natural father "identified to the satisfaction of the court" if a mother relinquishes her child for adoption or consents to adoption or the child otherwise becomes the subject of an adoption proceeding. CAL. CIV. CODE § 7017(a), (b), (d), (f) (West 1983). If the father is not a "presumed" father under CAL. CIV. CODE § 7004(a) (West 1983), however, his consent is not required for the adoption of the child regardless of his fitness. In the absence of unfitness, the consent of all mothers and "presumed" fathers is required for adoptions of their children. *Id.* § 224.

A statute with a similar effect was at issue in *Quilloin v. Walcott*, 434 U.S. 246 (1978). That statute required the consent only of the mother for adoption of an illegitimate child. Act of Mar. 27, 1941, Pub. L. No. 274, § 3(3), 1941 Ga. Laws 300, 301 (codified as amended at GA. CODE § 74-403(a)(3) (1975)) (amended 1977). In *Quilloin* the father was notified and allowed to participate, but the standard used against him was best interests. Statutes with a similar effect also were at issue in *Caban v. Mohammed*, 441 U.S. 380 (1979). Act of Apr. 9, 1938, ch. 606, § 1, 1938 N.Y. Laws 1610, 1612 (codified as amended at N.Y. DOM. REL. LAW § 111 (McKinney 1977)) (amended 1980, 1983) (consent of mother alone required for adoption of child born out of wedlock in the absence of her unfitness); Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980) (unwed fathers in certain categories notified of adoption proceedings affecting their children and allowed to participate); Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389, 1390 (codified as amended at N.Y. DOM. REL. LAW § 111-a(3) (McKinney 1977)) (amended 1980) (participation of unwed fathers as notified limited to arguments about the child's best interests).

The New York statute has been changed since the state court proceedings in *Lehr v. Robertson*, 103 S. Ct. 2985 (1983), and *Caban v. Mohammed*, 441 U.S. 380 (1979). New York law now requires the consent of unwed fathers to the adoptions of their children in two situations. First, consent is required if the child is more than six months old and the father has maintained a substantial relationship with the child manifested by support and regular communication or visiting with the child or with the child's custodian. Provision is made for situations where visiting and communication are prevented by the custodian. A presumption of a substantial relationship arises if the father has openly lived with the child for a period of six months within the year preceding placement for adoption and has openly acknowledged his paternity. Second, consent is required if the child is less than six months old when placed for adoption and the father openly lived with the child or the child's mother for a continuous six-month period preceding placement, openly acknowledged his paternity, and paid a reasonable share of the pregnancy and birth medical expenses. N.Y. DOM. REL. LAW § 111(1)(d)-(e) (McKinney Supp. 1983-1984). These changes in the New York law, particularly the changes concerning children under the age of six months, still embody significant differences in the substantive rights of unwed fathers and the rights of married fathers and all mothers. Section 111 provides for notice to all those persons, including certain unwed fathers who now have consent rights. N.Y. DOM. REL. LAW § 111(3) (McKinney Supp. 1983-1984). Fathers who are notified only under § 111-a(2), on the other hand, are still notified only so they can present evidence about the child's best interests. Further, notice is not required if the father has been notified of other proceedings affecting the child. N.Y. DOM. REL. LAW § 111-a(1) to (3) (McKinney 1977 & Supp. 1983-1984).

Georgia law also has been changed since the opinion in *Quilloin v. Walcott*, 434 U.S. 246 (1978). Georgia law now generally requires the consent of any parent whose rights have not been terminated. GA. CODE ANN. § 19-8-3(a) (1982). Consent or prior termination is not required when the parent has abandoned the child, cannot be found by diligent search, is insane or otherwise incapacitated and unable to consent, or, in relative adoptions, has failed to communicate with or support the child. *Id.* § 19-8-6(a). The Georgia statute now provides an elaborate scheme for the notification of putative

some states do not even notify or provide for participation by some unwed fathers in the procedures that effect the termination of their interests.²¹ For example, under the New York scheme, Lehr, who had failed to register as a father who intended to claim paternity, was not even notified of the adoption proceeding that terminated any interest he might have had in Jessica.²²

Because most states are quite protective of the parental interests of natural parents other than unwed fathers, United States Supreme Court opinions in response to challenges to terminations brought by parents other than unwed fathers generally have concerned the precise form required of the procedural protections that all agree must be afforded.²³ Furthermore, the United States Supreme Court has strongly implied that the state may not terminate the relationship between parents and children within a traditional family unit without substantial reasons.²⁴ Because of the widespread practice of treating unwed fathers differently from other parents, however,²⁵ the challenges of unwed fathers against such practices have presented the Court with fundamental questions concerning the nature of the parent-child relationship. If an unwed father is ignored or given much less protection in the adoption process than other parents, his challenge to this treatment forces the Court to identify what elements in parent-child relationships make them worthy of constitutional protection. Only then can the Court decide whether the unwed father's interests are entitled to protection.

fathers and a step-by-step consideration of whether they have the right to consent to the adoptions of their children. *Id.* § 19-8-7. If the identity and location of the putative father are known, he shall be notified of the mother's consent or the termination of her rights. *Id.* § 19-8-7(a). If his identity or location is not known, a reasonable attempt must be made to identify and locate him, and, depending on his involvement with the child, the court will either terminate his rights or enter "an order designed to afford the putative father notice . . ." *Id.* § 19-8-7(b). The mother is not required to identify the father, and her name will not be used to notify him unless the court finds a significant involvement between the father and the child. *Id.* § 19-8-7(b), (c)(5) (1982 & Supp. 1983). Even after notification, however, the father's consent to adoption will not be required unless he successfully obtains an order of legitimation. *Id.* § 19-8-7(d), (e) (1982). Legitimation is governed by the legitimation statute, *id.* § 19-7-22, which appears to use the best interests of the child standard. See *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981). Thus, in Georgia, as in Texas, the unwed father's rights still ultimately depend on a judge's determination of the best interests of the child. See *infra* text accompanying notes 487-517 (discussing the Texas scheme).

21. See, e.g., N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1983-1984) (unwed fathers who are not in the statutory categories are not notified of adoption proceedings affecting their children); UNIF. PARENTAGE ACT § 24(f) (1973) (no need to attempt to notify a natural father not identified to the satisfaction of the court); TEX. FAM. CODE ANN. §§ 11.09(a)(7)-(8), 11.01(3), 12.02 (Vernon 1975 & Supp. 1982-1983) (only "parents" must be notified of adoption and termination proceedings generally; many unwed fathers excluded from definition of "parent"; alleged father required to be notified only of termination of mother's rights). But see *Rogers v. Lowry*, 546 S.W.2d 881 (Tex. Civ. App. 1977); see also *In re T. E. T.*, 603 S.W.2d 793, 797 (Tex. 1980) (implied that at least some unwed fathers are entitled to procedural protections before any potential interest they may have is finally terminated), *cert. denied sub nom. Oldag v. Christian Charities*, 450 U.S. 1025 (1981).

22. Mr. Lehr did not fit into any of the categories of persons entitled to notice of adoption proceedings affecting the child. *Lehr*, 103 S. Ct. 2985, 2988 (1983). See *supra* notes 20, 21 for discussion of the New York statutes.

23. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (standard of proof in a termination proceeding must be greater than a preponderance of the evidence); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (appointment of counsel for indigent parents not always required in termination proceedings).

24. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) ("If a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'") [hereinafter cited as *O.F.F.E.R.*], quoted with approval in *Santosky v. Kramer*, 455 U.S. 745, 760 n.10 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

25. See *supra* notes 17-22 and accompanying text.

For this reason, the United States Supreme Court opinions dealing with claims by unwed fathers challenging terminations of their parental interests are the most useful source for reaching an understanding of current constitutional attitudes toward the parent-child relationship. This Article will analyze terminations aimed at freeing children for adoption by others. In the process it will explore what the United States Supreme Court has said about the constitutional interests of unwed fathers, with particular emphasis on *Lehr*, in an attempt to reach some understanding of what protection the opinions imply for unwed fathers who may make claims in the future.

II. THE DEVELOPED PARENT-CHILD RELATIONSHIP²⁶

Only four opinions of the United States Supreme Court have dealt directly with the constitutional claims of unwed fathers against state action terminating their relationships with their children. Thus, the opinions in *Stanley v. Illinois*,²⁷ *Caban v. Mohammed*,²⁸ *Quilloin v. Walcott*,²⁹ and *Lehr v. Robertson*³⁰ must be the primary sources for analysis.³¹ Before turning to those cases, however, it is necessary to explain the concept of "custody," a concept of great importance in considering the parent-child relationship.

A. The Nature and Significance of Custody

Constitutional protection for a parent's right to maintain a relationship with his or her child does not derive from some kind of parental possessory right existing in a vacuum. Rather, the protection is inextricably entwined with the parent's constant responsibility to care for the child.³² The relationship is truly one of rights and responsibilities. Parents have the "right, coupled with the high duty, to prepare their children for additional obligations which the state can neither supply nor hinder."³³ In earlier times, the law focused much more on parents' legal rights than on their legal duties.³⁴ More recently, however, the legal right has been considered much

26. "Developed" is Justice Stevens' term. *Lehr*, 103 S. Ct. 2985, 2993 (1983).

27. 405 U.S. 645 (1972).

28. 441 U.S. 380 (1979).

29. 434 U.S. 246 (1978).

30. 103 S. Ct. 2985 (1983).

31. The Court may soon be faced with another claim in the Texas case of *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. Civ. App. 1982), *vacated sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983). See *supra* note 17 for a discussion of the history of this case. See *infra* notes 487-517 and accompanying text for further discussion.

32. The Court "has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr*, 103 S. Ct. 2985, 2991 (1983); see also *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations'" (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (Parents have the "right, coupled with the high duty, to prepare their children for additional obligations." (emphasis added)); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.").

33. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

34. 1 W. BLACKSTONE, COMMENTARIES *446-54, reprinted in R. MNOOKIN, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 157-62, 169-71 (1978); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181-82 (1916).

more dependent on performance of the legal duty.³⁵ Thus, the emphasis of the law has moved from the position that children are dependent on their parents' good will for their very sustenance and parents have a concomitant absolute power over their children to the position that children ought to be cared for by their parents and parents have a concomitant legal obligation to provide care.³⁶

This shift in emphasis has resulted in the intermingling of the parental right to control the child with the parental duty to care for the child.³⁷ The intermingling is reflected in statutes defining the status of having "custody or legal custody" of a child. For example, in Arizona that status "embodies the following rights and responsibilities:

- (a) The right to have physical possession of the child;
- (b) The right and duty to protect, train and discipline the child; and
- (c) The responsibility to provide the child with food, shelter, education and ordinary medical care"³⁸

35. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); H. CLARK, *supra* note 9, §§ 6.2, 17.5; Pound, *supra* note 34 (development of a parent's moral duty of support into a legally enforceable obligation to support).

36. See generally Foster & Freed, *A Bill of Rights for Children*, in *THE YOUNGEST MINORITY* 318 (S. Katz ed. 1974).

37. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198–1242, 1351–57 (1980). This emphasis has also resulted in a notion of the state's own *parens patriae* interest in child protection and development, an interest so strong that it often justifies state displacement of parental control of the child—for the child's sake. For a more elaborate discussion of the ideas expressed in this note, see Buchanan, *The Constitution and the Anomaly of the Pregnant Teenager*, 24 ARIZ. L. REV. 553, 560 n.40 (1982).

In Arizona, a natural parent may be entitled to legal custody of his or her child in the sense of having the rights to "physical possession" of the child and to "protect, train and discipline" the child. ARIZ. REV. STAT. ANN. § 8-531(8) (1974); see *In re Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981). The very same statute and case, however, define custody as a status embodying the responsibility and duty to "protect, train and discipline" the child and to "provide the child with food, shelter, education and ordinary medical care." ARIZ. REV. STAT. ANN. § 8-531(8)(c) (1974); *In re Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981). If the parent does not perform the obligations of custody, the child may be adjudicated a "dependent" child who has no parent willing to exercise or capable of exercising "proper and effective parental care and control," ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1974-1983), and who can be subjected to the control of the state through its juvenile court, *id.* § 8-241(A)(1). These statutes are not really sequential, but "proper and effective parental care and control" surely embody the responsibilities of custody.

The United States Supreme Court cases recognizing constitutional rights in parents to the custody and control of their children really do no more than make a matter of federal constitutional law that which the laws of the states have generally recognized as worth protecting. This Article considers the nature of the federal protection given the parental right and duty and the identity of those who have the anterior right to take on parental rights and duties. Traditionally, that anterior right, as a matter of state law, has belonged to married parents and to the natural mothers of out of wedlock children. That natural fathers of out of wedlock children do not have an anterior right without taking special legal steps is implicit in the statutory schemes that dispense with the need for their consent to the adoptions of their children. See statutes discussed *supra* notes 17-21. That they do not have that right is explicit in (1) statutes giving "custody" rights to all mothers, but only to "presumed" fathers of children—fathers who have married or attempted to marry the mother or have lived with the child as a father, CAL. CIV. CODE §§ 197, 17004 (West 1982); (2) statutes setting out the rights and duties of "parents" defined as the natural mother of a child and the man to whom the child is a legitimate child by virtue of marriage, attempted marriage, or formal adjudication, TEX. FAM. CODE ANN. §§ 11.01(3), 12.01, 12.04 (Vernon 1975 & Supp. 1982-1983); and (3) cases recognizing the right to custody only in unwed fathers who have married the mothers of their children or who have properly complied with other formal requirements for establishing themselves as entitled to parental rights, *Caruso v. Superior Court*, 100 Ariz. 167, 412 P.2d 463 (1966); cf. *Steffen v. Bunker (In re Adoption of Krueger)*, 7 Ariz. App. 132, 436 P.2d 910 (1968).

38. ARIZ. REV. STAT. ANN. § 8-531(8) (1974) (chapter relating to termination); see also *id.* § 8-101(4) (similar language; chapter relating to adoption). See generally H. CLARK, *supra* note 9, §§ 17.1, .5.

Arizona, like other states, recognizes that the parent of a child initially has the rights embodied in the status of custody, but that those rights are entirely dependent on performance of the obligations that are also embodied in the status.³⁹

The United States Supreme Court cases give this basic precept of state law constitutional significance as a paramount governing rule.⁴⁰ The federal constitutional right, like the state right, appears to depend on the performance of the obligations inherent in custody.⁴¹ In the terms of the Arizona statute, parents have the right to "physical possession" of their child and to "protect, train and discipline" the child only if they do "protect, train and discipline" the child and "provide the child with food, shelter, education and ordinary medical care."⁴²

If a child in need of shelter and other material goods and of guidance and discipline and other developmental necessities is being given these necessities by an adult, it is logical to protect the adult's interest in continuing to give them. If some constitutional protections derive from a fundamental perception of what private interests serve basic public needs, it makes constitutional sense to protect adults who fulfill the basic public values of providing children with their material, emotional, and developmental needs.⁴³ That conclusion, however, does not answer the question why biological parents get this special protection, nor does it answer the question why biological parents who are no longer carrying out the responsibilities of custody still receive extraordinary protection when the state seeks to terminate any remaining legal relationship they may have with their children.⁴⁴

The Court has not given a precise answer to the first question. In *Smith v. Organization of Foster Families for Equality and Reform (O.F.F.E.R.)*,⁴⁵ when faced with a claim by foster parents that they were filling all the needs of children and, therefore, should be given the rights given to parents who filled those needs, the Court emphasized the difference between the traditional family, defined by biological

39. *In re Appeal in Pima County, Juvenile Action No. S-111*, 25 Ariz. App. 380, 543 P.2d 809 (1975), review denied, 113 Ariz. 247, 550 P.2d 625 (1981); see CAL. CIV. CODE § 197 (West 1982); TEX. FAM. CODE ANN. § 12.04 (Vernon Supp. 1982-1983); H. CLARK, *supra* note 9, §§ 17.2, .5.

40. See *supra* note 32; see also *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

41. See *supra* note 32. Professor Bruce Hafen has pointed out that the Constitution has been construed to protect only the "private" rights of those parents who have performed "the public good" served by protection for marriage and kinship relationships. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interest*, 81 MICH. L. REV. 463, 553-60 (1983). The quotations are from Professor Hafen's discussion of Louis Henkin's proposal that requests for protection of privacy interests like parent-child relationships require a balancing of public goods and private interests at some point in defining the private interest as one to be specially protected by the Constitution. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974). The analysis of the nature of the parental right in this Article is analogous to Professor Hafen's thesis because herein the degree of protection is defined by considering the degree to which the private interests serve, have served, or will serve the public good of providing for children.

42. ARIZ. REV. STAT. ANN. §§ 8-531(8), -108(A) (1974).

43. The dual emphasis in the Supreme Court cases on rights and duties, see *supra* note 32, makes clear that at least this fundamental right derives from a basic social perception about the needs of children. The protection and development aspects of the child's needs come from the analysis in an earlier article on the needs of immature pregnant minors in the abortion context. See Buchanan, *supra* note 37, at 558-62, 583-98.

44. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Caban v. Mohammed*, 441 U.S. 380 (1979).

45. 431 U.S. 816 (1977).

ties and the lack of any required state involvement, and a foster family,⁴⁶ and said that protection for a traditional family relationship has its source in "intrinsic human rights."⁴⁷ While commentators differ on the reasons for denominating the relationship between a natural parent and his or her child as an "intrinsic human right," they agree that if the Constitution has a place for any intrinsic human rights that are not explicitly mentioned in it, the natural parent's interest in maintaining a relationship with his or her child is one of those rights.⁴⁸

Regarding the second question, the Court in *O.F.F.E.R.* stressed that the "importance of the familial relationship"⁴⁹ between parents and children results not only from the blood relationship, but also from the "emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children . . ."⁵⁰ Parents and children obtain more than custodial power on the one side and good custodial care on the other from their relationship. They also form emotional attachments to each other in the course of their association in a custodial parent-child relationship. Those emotional attachments do not disappear automatically just because the parent loses custody of his or her child or, according to the experts, just because a parent does not perform custodial responsibilities as the state would like.⁵¹ The children often retain emotional attachments long after they have been physically separated from their parents.⁵²

Goldstein, Freud, and Solnit have asserted that the parents' freedom from state interference in childrearing is necessary to maintain the psychological bond that arises between a child and a committed caretaker.⁵³ For these writers, it is this psychological bond that is the critical developmental need of every child,⁵⁴ and the parents' custodial rights to provide for the child's physical and emotional needs are

46. *Id.* at 845. The Court also emphasized the difference between a state-arranged fostering situation and relationships like natural families that have their "origins entirely apart from the power of the state." *Id.*; see also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (biological family given precedence over voluntary association of unrelated individuals; difference also in childcare functions).

47. 431 U.S. 816, 845 (1977) ("the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights"); see also GFS I, *supra* note 14, at 16 ("blood-tie" gives biological parent "first right to the possession of the child").

48. See, e.g., GFS I, *supra* note 14, at 7, *passim* (need of children for autonomous parents so great that parental autonomy itself is an inherent value); GFS II, *supra* note 14, at 28-35; Hafen, *supra* note 41 (inherent value of the kinship relationship); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (inherent value of intimate associations to individuals, including, but not limited to, the association between parent and child).

49. 431 U.S. 816, 844 (1977).

50. *Id.* at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)). The *O.F.F.E.R.* language was recently quoted with approval in *Lehr*, 103 S. Ct. 2985, 2993 (1983).

51. GFS II, *supra* note 14, at 11-14, 50, 60-62. It is important to note that Goldstein, Freud, and Solnit would give no further deference to biological parents whose child has formed new emotional attachments (or "psychological ties" in the GFS terminology) with a present committed caretaker. *Id.* at 39-57. The Court has not made this distinction. *O.F.F.E.R.*, 431 U.S. 816 (1977) (interests of longtime foster parents, at least those whose fostering is the result of state arrangements, are not of the same level as those of a biological parent, even one who does not presently have custody of his or her child). But the Court has plainly coupled the emotional attachment developed between a caretaking parent and his or her child with biology as an essential aspect of protected parent-child relationships. See *Lehr*, 103 S. Ct. 2985, 2990-94 (1983); *O.F.F.E.R.*, 431 U.S. 816, 844 (1977); see also *Santosky v. Kramer*, 455 U.S. 745 (1982).

52. See, e.g., GFS II, *supra* note 14, at 59-62. The problem for the authors is determining when the child's bonds with his or her parent have been replaced by bonds with someone else. For them, when someone else has become the child's "psychological parent," that person's relationship with the child is the one to be protected. *Id.* at 39-57.

53. *Id.* at 3-14.

54. *Id.*; GFS I, *supra* note 14, at 16-28.

merely a necessary preliminary to establishment of the more critical psychological bond.⁵⁵ The Court has not adopted the Goldstein, Freud, and Solnit thesis as the constitutional policy reason for continuing to give special protection to parent-child relationships even when a parent no longer has custody of the child. The Court's reference to the "emotional attachments" between parents and children in cases like *O.F.F.E.R.*,⁵⁶ however, certainly is a recognition that the elements of a constitutionally protected parent-child relationship include the emotional ties between a parent and child, ties that are not eradicated just because someone else may be providing for the child's physical and emotional needs or because the parent may not be the best possible person to provide for those needs. In other words, the opinions reflect the idea that the emotional attachment of a child to his or her parent that is created while they live together is itself a "public good" making the private interest that has given rise to it worth protecting.

In summary, the parent's constitutional right to be with, provide for, and control his or her child is inextricably linked to the parent's duty to provide for the child's physical and emotional needs. The term "custody" has been used to describe this intermingling of rights and duties. That the Constitution particularly protects the custodial rights of biological parents who perform custodial responsibilities has been stated as a fact and explained in terms of tradition and natural right. That the Constitution continues to protect parent-child relationships even when parents no longer perform custodial responsibilities also has been stated as a fact and has been explained as a recognition that the emotional attachments that arise during a custodial relationship are worthy of protection even when the custodial aspect of the relationship no longer exists. Thus, parents who live with, provide for, and form emotional attachments with their children perform the social function of caring for children, and their interests are worth protecting. Under this analysis, unwed fathers who have custodial relationships with their children are parents whose interests are worth protecting.⁵⁷

This method of analysis basically provides a vehicle for defining certain relationships between parents and their children as worthy of constitutional protection. Consideration of the extent to which certain private activities serve basic social values has always been a respectable approach to the problem of determining whether those activities are worthy of constitutional protection.⁵⁸ When the activity is not one explicitly protected by the text of the Constitution, this approach has been advocated

55. GFS II, *supra* note 14, at 11.

56. 431 U.S. 816, 844 (1977).

57. The following are other commentators who have discussed the interrelationship of performance of the parental duties with the constitutional rights of parents in the termination context: Freeman, *Remodeling Adoption Statutes After Stanley v. Illinois*, 15 J. FAM. L. 385, 414-16 (1976); Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 531-40, 549-53 (1976); Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 97-100, 109-12, 124-27, 131-40 (1980) [hereinafter cited as Note, *Unwed Fathers*]; Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95, 114-17 (1979); Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 521-22 (1973) (this student note, however, states that the "better analysis identifies the liberty interest as founded upon the biological relationship between parent and child," *id.* at 522) [hereinafter cited as Note, *Strange Boundaries*].

58. See generally Hafen, *supra* note 41, at 553-60.

and followed by commentators⁵⁹ and by some Justices.⁶⁰ As noted above, the Court has consistently and explicitly coupled the mention of the parental "right" with the parental "duty" from which it derives.⁶¹ The term "duty" stands for the social values served by protecting parental rights, and the term "custody" and the activities it incorporates may be considered to define parental duty. Professor Bruce Hafen used the same method of analysis in a recent article to define various privacy interests, including parental interests, as interests deserving of constitutional protection.⁶² His consideration of the social value aspects of the analysis, however, is both quite different from that of this Article and wider-ranging.⁶³

This Article focuses on using the analysis for deciding whether particular private interests, those of unwed fathers in their children, are worthy of constitutional protection. The method of analysis includes two distinct stages at which the private interest's relation to social values must be considered.⁶⁴ The first stage consists of determining whether the interest is of any constitutional significance. This stage requires consideration of whether what the biological parent does, has done, or wants to do conforms to the social values reflected in the constitutional protection given to parents. If the interest is determined to be of constitutional significance because it serves those social values, the second stage requires consideration of the constitutionally protected private interest relative to various independent social values with which it may conflict. These independent social values are usually referred to as state interests.

B. *Unwed Fathers Who Have or Have Had Custody*

The Court has responded favorably to unwed fathers' challenges of state laws that treat unwed fathers differently from other parents only when it has perceived the claimant to be a man whose relationship with his child has amounted basically to what is described above as a custodial relationship.⁶⁵ In *Stanley v. Illinois*⁶⁶ the Court

59. See, e.g., Benn, *Privacy, Freedom, and Respect for Persons*, in *PRIVACY* 1 (J. Pennock & J. Chapman eds. 1971); Hafen, *supra* note 41; Henkin, *supra* note 41; Karst, *supra* note 48; Pound, *supra* note 34.

60. The best example is Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961). Justice Harlan said:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Id. at 542 (Harlan, J., dissenting). The most recent example is Justice Stevens' opinion for the Court in *Lehr*, 103 S. Ct. 2985 (1983).

61. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations,'" quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (Parents have the "right, coupled with the high duty, to prepare their children for additional obligations." (emphasis added)); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.").

62. Hafen, *supra* note 41, at 545-69.

63. *Id.* at 560-68, 472-91.

64. *Id.* at 559-60.

65. See *supra* subpart II(A).

66. 405 U.S. 645 (1972).

described Peter Stanley as a man who had "sired and raised" his children⁶⁷ and who had lived with and supported them all their lives.⁶⁸ Furthermore, no one questioned that Stanley was the natural father of the children.⁶⁹ Justice White, in his opinion for the Court, merely combined the two basic elements of a protected parent-child relationship to arrive at the conclusion that Peter Stanley's relationship with his children had constitutional stature. For the Court, the interest of a man like Stanley "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."⁷⁰ His interest, like that of other parents, was specifically "in the companionship, care, custody, and management of his . . . children."⁷¹

By equating the interest of a custodial unwed father with that of any other custodial parent, the Court effectively eliminated distinctions that had been made routinely by most of the states.⁷² That equation forced Illinois, and implicitly all other states, to try to justify the distinctions with a "powerful, countervailing interest."⁷³ In the *Stanley* situation, the applicable statutes, as construed by the Court, provided that all mothers and the fathers of legitimate children could not lose custody of their children to the state without proof in a judicial proceeding that the parents "were not providing adequate care."⁷⁴ The fathers of illegitimate children, on the other hand, were not included in the definition of parents whose children could not be taken from their custody except upon a showing of some kind of inadequacy, or "unfitness."⁷⁵ Thus, the state could assume custody merely upon proof that the father had never married the mother of the children.⁷⁶

In Stanley's case, the mother of his children had died, and, therefore, there was no longer any parent within his household with a right to custody that the state recognized.⁷⁷ Under the Illinois scheme, the state could place legal custody with someone else without giving Stanley an opportunity to protest and, specifically, without showing that Stanley was unfit to have custody of his children.⁷⁸ Although Stanley retained custody in fact after the children's mother died, his custody was not legal custody within Illinois law.⁷⁹ Since the Supreme Court declared Stanley's actual

67. *Id.* at 651.

68. *Id.* at 650 n.4. But see the dissenting opinion of Chief Justice Burger, in which he points out that Stanley himself had placed his children in the custody of others after their mother's death. *Id.* at 663 n.2 (Burger, J., dissenting). The majority obviously did not take this view of the matter. Also see GFS II, *supra* note 14, at 60-62 (parents may temporarily place care of children with others without being held to have waived their protected interests in the child's custody; the important point is determination of the person with whom the child has a psychological bond).

69. 405 U.S. 645, 651 (1972).

70. *Id.*

71. *Id.*

72. See, e.g., statutes cited *supra* notes 17-21.

73. 405 U.S. 645, 651 (1972).

74. *Id.* at 649-50.

75. *Id.* at 652-54. From the Court's discussion in *Stanley* it is clear that "unfitness" connotes some incapacity, unwillingness, or specific misconduct on the part of the parent concerning the care of the children. See *supra* note 14 for a discussion of the concept of "unfitness."

76. 405 U.S. 645, 650 (1972).

77. *Id.*

78. *Id.* at 649-50.

79. *Id.* at 647-50. The Court contrasts the custody and control of a guardian with the rights of parenthood. A guardian's custody is not complete because it is subject to change by the state in the interests of the children rather than upon a showing of unfitness. *Id.* That kind of custodial power is not the same as that outlined *supra* subpart II(A).

custody of his children to be protected by the Constitution,⁸⁰ however, Illinois had to explain satisfactorily its failure to accord to his actual custody the same legal significance it accorded to the custody of other parents.

In the Court's view, Illinois' general interests were "to protect the moral, emotional, mental, and physical welfare of the minor . . . and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety . . . ' cannot be adequately safeguarded without removal"⁸¹ Since Illinois did not recognize unwed fathers as "parents," its legislative goal of leaving children in the "custody of their parents" had not included children in the custody of fathers like Stanley.⁸² Because Justice White characterized Stanley as a parent with the same constitutional protections as other custodial parents, however, he treated the general state goal as applicable to children in the custody of unwed fathers.⁸³ Justice White assumed the power of the state to remove children from parents who threatened the children's safety or welfare,⁸⁴ but no showing had been made that Stanley's custody of his children actually threatened their safety or welfare. If Stanley were a fit parent,⁸⁵ removal of his children would do nothing to further the state's interest in the welfare or safety of his children and would actually detract from the state's interest in strengthening the children's "family ties."⁸⁶ The state had to defend its failure to provide any kind of procedure to prove or disprove Stanley's actual fitness.

As the Court viewed it, Illinois' defense depended on the conclusive presumption that all unwed fathers are unqualified to have custody of their children.⁸⁷ Illinois' support for that presumption rested on assertions that illegitimate children usually are raised only by their mothers, usually lack a family relationship with their fathers, and may have no relationship with their fathers.⁸⁸ The state also argued that men are not "naturally inclined to childrearing" and that fathers of illegitimate children in particular are not interested in their children in the same way that married fathers are and do not have the same legal responsibility for their children that married fathers have.⁸⁹ While any unwed father to whom these assertions applied might well have been unqualified to raise his children, nothing justified a conclusion that these assertions applied to all unwed fathers. Thus, the state had no basis for concluding that the state's interest in protecting the safety and welfare of children would always be

80. 405 U.S. 645, 651 (1972).

81. *Id.* at 652. *Stanley* was not a case in which the state removed the children for purposes of adoptive placement, so the legitimating effect of adoption and the greater stability conferred by state recognition of adoptive parents as equal in right to mothers and married fathers could not be asserted by the state. See *infra* notes 128-33 and accompanying text. Further, *Stanley* did not involve a conflict between Stanley and the mother of his children. See *infra* notes 225-37 and accompanying text. Finally, there was no conflict between Stanley and another committed caretaker. See *infra* notes 280-92 and accompanying text.

82. 405 U.S. 645, 650-52 (1972). Chief Justice Burger also makes this point in dissent. *Id.* at 664 n.3 (Burger, C.J., dissenting).

83. *Id.* at 652-53.

84. *Id.* at 652.

85. *Id.* at 653.

86. *Id.* at 652.

87. *Id.* at 653.

88. *Id.* at 653 n.5.

89. *Id.*

served by not requiring proof of the individual unfitness of a father like Stanley. Given the constitutional stature of Stanley's interest in retaining custody of his children, the possibility of error in the state's procedure was too high to justify the procedure by reference to its accuracy.⁹⁰ Further, although a small risk of inaccuracy ordinarily might be excused because of the inefficiency of always providing hearings on fitness, the constitutional stature of a custodial father's interest precluded that excuse in Stanley's case.⁹¹

Illinois' assertions about the characteristics of unwed fathers mostly concerned elements of the concept of custody discussed earlier.⁹² Illinois asserted that unwed fathers are strangers to their children, do not live with them, and are not interested in them.⁹³ Stanley, an unwed father, was clearly not a stranger to his children, had lived with them, and was at least interested enough in them to protest their removal from his custody.⁹⁴ But Illinois also rested its presumption on conclusions that all men are somehow different from women in childrearing abilities and that unwed fathers are different from married fathers because married fathers have different interests in their children and have a legal responsibility to support them.⁹⁵ If these assertions had been accepted by the Court, it would not have mattered that Stanley had raised his children, was interested in them, and had supported them because he, like all unwed fathers, would have been less able to raise them, less interested in them, and not legally obligated to support them. By disregarding those assertions that might have applied to Stanley, the Court implied something about both the nature of the custody that gives rise to constitutional protection and the conditions that a state may use as evidence of unfitness.

First, inherent differences, if any exist, between the childrearing capacities of men and women are not of constitutional significance in determining whether the interest of a custodial father (*i.e.*, one who is rearing his children) is worthy of the same constitutional protection that the interests of other custodial parents receive against state interferences. Further, those differences alone do not amount to constitutional justification for finding a custodial father unfit to retain custody of his children. This conclusion does not mean that differences between men and women might not justify state interferences in other circumstances.⁹⁶ Second, inherent differences, if any exist, between the interests of married fathers and fathers legally obligated to support their children and the interests of unmarried custodial fathers who are actually supporting their children also do not justify denying constitutional protection to unmarried custodial fathers. Those differences among fathers, without more, do not justify finding an unwed custodial father without a legal support obligation unfit to retain custody of his children. Once again, however, those differences

90. *Id.* at 654-55.

91. *Id.* at 656-57.

92. *See supra* subpart II(A).

93. *See supra* notes 88-89 and accompanying text.

94. *See supra* notes 66-71 and accompanying text.

95. *See supra* note 89 and accompanying text.

96. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 404-09 (1979) (Stevens, J., dissenting) (inherent differences between mothers and fathers of newborns justify differential treatment in the adoption process).

might be significant when claims are made by other kinds of unwed fathers or when other state justifications are raised.⁹⁷

The Court addressed the significance of the alleged differences discussed above in *Caban v. Mohammed*.⁹⁸ Abdiel Caban, like Peter Stanley, was a man whose paternity of his children was unquestioned.⁹⁹ Moreover, he had lived with them, contributed to their support, and generally exercised custodial responsibility for them.¹⁰⁰ He also was still quite interested in his children and wanted custody of them.¹⁰¹ Last, he had never married their mother or in any other way legitimated his children.¹⁰² In all other particulars, however, Caban's situation differed drastically from Stanley's.

Although Caban had once had actual custody of his children along with their mother and had even had sole actual custody for a time, their mother had gained full legal custody prior to the dispute considered by the Supreme Court.¹⁰³ Thus, Caban, unlike Stanley, could claim protection only for the emotional ties created by a past custodial relationship and not for a current custodial relationship.¹⁰⁴ The Court never addressed Caban's claim as one for current custody, and, indeed, New York could defend its award of custody to the mother very differently from the way in which Illinois had defended its removal of custody from Stanley and placement of custody with strangers.¹⁰⁵ Caban challenged the New York statutory scheme that allowed the adoption of his children by their mother's husband without Caban's consent.¹⁰⁶ The effect of that adoption would not be merely a validation of the custody already presumably exercised by the stepfather but a vesting in the stepfather of all the rights of a parent in the children and an irrevocable termination of any relationship Caban might have with them.¹⁰⁷

Although *Caban* struck down the state scheme on sex discrimination grounds,¹⁰⁸ the Court's comparison of the interests of a once-custodial father to the interests of a presently custodial mother has broader significance for the constitutional status of unwed fathers. Justice Powell, for the Court, stated clearly that a father like Caban, who had lived with his children and their mother for several years and had "participated in the care and support"¹⁰⁹ of the children, "may have a relationship with his

97. See the discussion of *Quilloin v. Walcott*, 434 U.S. 246 (1978), *infra* notes 174-87 and accompanying text; see also *infra* notes 265-92 and accompanying text.

98. 441 U.S. 380 (1979).

99. *Id.* at 382, 393.

100. *Id.* at 382, 389.

101. He strenuously objected to their adoption by their stepfather and petitioned for his wife's adoption of them. *Id.* at 383-84. He also contested the mother's claim for sole custody, which preceded the petition for adoption. *Id.* at 383.

102. *Id.* at 382, 388 n.6.

103. *Id.* at 383.

104. See *supra* notes 49-56 and accompanying text.

105. Even if Caban were considered by the state as a parent with the same rights as those of the children's mother, the most the state could do when forced to choose between two parents with equal rights would be to use a neutral standard. See R. MNOOKIN, *supra* note 34, at 475-76; see also *infra* notes 215-39 and accompanying text.

106. 441 U.S. 380, 384-87 (1979).

107. *Id.* at 384 n.2; see also *supra* notes 4-13 and accompanying text.

108. 441 U.S. 380, 394 (1979).

109. *Id.* at 389.

children fully comparable to that of the mother."¹¹⁰ Justice Powell made that statement even though Caban no longer had custody of his children and the children's mother currently had custody and was likely to retain it. Justice Powell further stated that there was "no reason to believe that the Caban children . . . had a relationship with their mother unrivaled by the affection and concern of their father."¹¹¹ Thus, although Caban, unlike Stanley, could not claim that the New York statute tore apart a family living together, the Court recognized that the relationship established by Caban's former care and support of his children was potentially of equal weight with the relationship they currently had with their custodial mother.¹¹² Justice Powell's point was not that a noncustodial father's relationship with his children is similar to that of a noncustodial mother, but that a once-custodial father's relationship is similar to that of a presently custodial mother.

If once-custodial fathers, at least for purposes of consent to adoption, have a claim to equal treatment by the state with currently custodial mothers, they should also have an absolute claim against unequal treatment even when that treatment is based on the absence of custody rather than on sex.¹¹³ Thus, after *Caban*, noncustodial unwed fathers (or mothers) who have had custody in the past might be able to claim independent constitutional protection against state statutes that terminate their relationships with their children even though the statutes do not make sex-based distinctions. This conclusion, however, does not mean that any unwed father in Caban's position could, after *Caban*, claim the substantive protection against a non-discriminatory statute that Caban received because of the sex discrimination in the New York statute. The claim would merely be for equality of treatment for all currently custodial and once-custodial parents. Justice Powell explicitly refused to reach the issue of what standards might be satisfactory in the absence of discrimination.¹¹⁴ *Caban* does mean, however, that whatever substantive standards are required for the protection of current custodial relationships ought to be required for relationships like Caban's.

Caban's claim could be distinguished from Stanley's not just because his present relationship with his children was different, but also because he was not asking only for the procedural protections of notice of and participation in the state process that terminated his relationship with his children. Caban was given every opportunity to present his arguments against the adoption of his children by their stepfather.¹¹⁵ Caban could only argue the children's best interests, however, while their mother could block adoption merely by withholding her consent.¹¹⁶ The mother's objection could be disregarded only if she were proved to be unfit.¹¹⁷ Caban's objections,

110. *Id.*

111. *Id.*

112. At least their weight was equal as against a state statute that gave mothers the power to withhold consent to the adoptions of their children, while denying the same power to such fathers.

113. Such a claim would have to be based on the denial to one group of parents of the right to retain the emotional relationship with one's children that is developed during a custodial relationship.

114. 441 U.S. 380, 394 n.16 (1979).

115. *Id.* at 385 n.3, 384-85.

116. *Id.* at 385-87.

117. *Id.* at 386 n.4.

however, even if he were a perfectly adequate parent, could be disregarded if the court found adoption to be better for his children.¹¹⁸

The New York statute, by providing for participation by a father like Caban but not for equal substantive standards, reflected a common assumption about *Stanley*,¹¹⁹ the assumption that although *Stanley* elevated an unwed father's relationship with his children to constitutional status, the unwed father's relationship was not of the same constitutional significance as that of other parents.¹²⁰ Under this assumption, *Stanley* required a state to allow an unwed father to present his case when the state tried to interfere with his relationship with his children, but did not require the state to justify its interference on the same substantive grounds as used to justify interference with other parent-child relationships.¹²¹ This reading of *Stanley* was both too broad and too narrow. It was too broad because it assumed that all of the procedural protections given to Stanley must be available to any unwed father.¹²² It was too narrow because it did not account for all of the procedural and substantive protections that must be given to unwed fathers like Stanley.¹²³ As a custodial unwed father, Stanley had a constitutional interest in his relationship with his children that was equal to the interests of other custodial parents.¹²⁴ His interest entitled him not only to a hearing on any standard the state might choose, but to a hearing on his fitness because fitness was the standard applied to state removals of children from other custodial parents.¹²⁵ It was his custody of the children, not his biological connection alone, that gave him a constitutional interest, but that interest was of the same stature as that of any other custodial parent. Similarly, once Caban's interest in his children was equated with

118. *Id.* at 387.

119. 405 U.S. 645 (1972).

120. See, e.g., *In re T. E. T.*, 603 S.W.2d 793 (Tex. 1980), *cert. denied sub nom.* Oldag v. Christian Charities, 450 U.S. 1025 (1981), in which the Texas Supreme Court implied that *Stanley* required notice and participation rights for unwed fathers, but did not require consent rights for unwed fathers. See also the New York scheme described in *Lehr*, 103 S. Ct. 2985, 2987-88 & nn.4-5 (1983) (probably the same scheme in effect at the time of *Caban*). In New York, at the time *Lehr* went to trial, many unwed fathers were entitled to notice of adoption proceedings affecting their children. *Id.* at 2988 n.5 (quoting Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980)). However, their participation in the proceedings was limited to the presentation of "evidence relevant to the best interests of the child." Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389, 1390 (codified as amended at N.Y. DOM. REL. LAW § 111-a(3) (McKinney 1977)) (amended 1980). The Court quoted from the report of the commission drafting those statutes that the purpose of the statute was to "codify the minimum protections for the putative father that *Stanley* would require." 103 S. Ct. 2985, 2994 n.20 (1983). At the time *Caban* was decided, no unwed father in New York had the right to veto his child's adoption by withholding consent. Act of Apr. 9, 1983, ch. 606, § 1, 1983 N.Y. Laws 1610, 1612 (codified as amended at N.Y. DOM. REL. LAW § 111 (McKinney 1977)) (amended 1980, 1983). Under current New York law some unwed fathers have consent rights. N.Y. DOM. REL. LAW § 111(d)-(e) (McKinney Supp. 1983). It appears that a father like Caban would be covered by current New York law. See discussion of New York law *supra* note 20.

121. See Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53-75 (1975); Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 9-12 (1978); Freeman, *supra* note 57, at 386-94, 410-11, 414-16; Note, *Strange Boundaries*, *supra* note 57, at 521-22; Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 WASH. U.L.Q. 1029, 1029-42, 1045-49 [hereinafter cited as Note, *Unwed Fathers: An Analytical Survey*]; Comment, *supra* note 57, at 99-102. See state procedures discussed *supra* notes 10, 17, 20.

122. See *infra* notes 321, 329-30 (discussion of difficulties in providing procedural protections to all unwed fathers).

123. The New York scheme described *supra* note 120 was too narrow on both counts because it did not provide for notice to all unwed fathers like Stanley who might have relationships with their children, and it did not provide for consent rights to any unwed fathers. See further discussion *infra* notes 124-49, 331-76, and accompanying text.

124. See *supra* notes 77-97 and accompanying text.

125. 405 U.S. 645, 658 (1972).

that of their mother for purposes of consent to adoption, his claim was no longer for the minimum protection the Constitution might require the state to give all parents. Rather, he also had a particular claim for the same treatment that the state chose to give to the children's mother, because of federal constitutional protection against unequal treatment by the state. Thus, allowing Caban to participate in the adoption proceeding was not enough because a parent with a relationship similar to his (*i.e.*, his children's mother) received better substantive treatment from the state. New York, then, could not defend its statute by saying that in adoption situations the interests of noncustodial fathers who have had custody in the past are of less constitutional significance than the interests of currently custodial parents like Stanley and the mother of Caban's children or the interests of mothers in general. Nor could New York defend its statute by saying that all unwed fathers, no matter how close their relationships with their children, are only entitled to the procedural protections of notice and hearing because their interests are not equivalent to those of other parents.¹²⁶ Nevertheless, Caban's situation was different from Stanley's in yet another way, and the Court had to deal with, or avoid, that difference. In *Caban* the state had an interest in the adoption of illegitimate children by their custodial mother's husband, but in *Stanley* this interest was not present.¹²⁷ In *Caban*, therefore, the Court had to deal with New York's treatment of Caban as a means to promote the state's interest in the adoption of illegitimate children.

New York was unable to rely on a claim that men like Caban have invariably different interests in their children from those of women like the mother of Caban's children.¹²⁸ Nevertheless, New York also argued that the differential treatment was substantially related to its interest in "promoting the adoption of illegitimate children."¹²⁹ According to Justice Powell, New York was asserting that a requirement of the consent of unwed fathers to the adoptions of their children would have the effects of "denying homes to the homeless," denying the "other blessings of adoption" to children, continuing the stigma of illegitimacy, and impeding "the worthy process of adoption."¹³⁰ People might be discouraged from adoption if the unwed father's consent were required, men like the Caban children's stepfather might be discouraged from marriage because they could not adopt their stepchildren without the natural father's consent, and, because unwed fathers are so often unavailable, requiring their consent could impede or even prevent adoptions of their children.¹³¹

Justice Powell did not question the importance of New York's interest in promoting the adoption of illegitimate children; he did not question the state's interest in providing homes for the homeless, providing "normal, two-parent home[s]" for children, or even removing the stigma of illegitimacy.¹³² Neither did he address the issue whether New York, or any other state, could serve these important interests by

126. See *supra* notes 108-25 and accompanying text.

127. See *supra* notes 77-84 and accompanying text.

128. See *supra* notes 87-97, 108-25, and accompanying text.

129. *Caban*, 441 U.S. 380, 389 (1979).

130. *Id.* at 390.

131. *Id.* at 390-91.

132. *Id.* at 391.

dispensing with the consent of all parents of illegitimate children to the adoptions of their children.¹³³ Rather, having concluded that the Constitution required a close look at any distinction made between the interests of Caban and the interests of the children's mother,¹³⁴ Justice Powell considered whether the state interest purportedly served by the statutory distinction between unwed fathers like Caban and unwed mothers justified treating unwed fathers and unwed mothers differently.¹³⁵ The broad statutory distinction, in Justice Powell's view, was not justified as a reflection of any real likelihood that fathers like Caban are more likely than mothers to object to the adoptions of their children.¹³⁶ Nor was it justified by the argument that impediments to adoption would be posed by the general unavailability of unwed fathers, because fathers like Caban with substantial relationships with their children are clearly not "unavailable."¹³⁷

In addition to Justice Powell's failure to discuss whether New York could serve its interests in adoption by not requiring any unwed parent's consent,¹³⁸ several other aspects of Justice Powell's approach in *Caban* are important. First, Justice Powell apparently did not think it necessary to analyze the state's asserted interest in promoting adoption by stepfathers and marriage between mothers of illegitimate children and potential adoptive fathers. That interest, which would indeed be served by a sex-based distinction, itself reflects an unconstitutional sex-based distinction.¹³⁹ More important, Justice Powell was careful to limit his discussion of the New York statute to its effect on fathers like Caban who have had substantial relationships with their children.¹⁴⁰ In particular, Justice Powell excluded fathers of newborn children and fathers of older children who have "never come forward to participate in the rearing of [their] child[ren]."¹⁴¹ He distinguished the former group of fathers by mentioning the potentially greater difficulties in locating them and distinguished the latter group of fathers by commenting that "nothing in the Equal Protection Clause precludes the State from withholding from [such a father] the privilege of vetoing the adoption of [his] child."¹⁴² Thus, in the event of a real difference in the availability of the fathers of newborns, differential treatment of them directed to their unavailability might be justified because of its substantial relationship to the state's interests in promoting adoption, regardless of the similarity of the fathers' interests to the mothers'. On the other hand, differential treatment of a father of an older child who has not established the kind of relationship that is promoted by participating in the child's rearing is justified because his relationship with the child is not similar to the moth-

133. In such a situation the state would not be treating the mothers and fathers of illegitimate children differently, nor would it be treating custodial and once-custodial parents differently. *But see* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *see also infra* notes 174-87, 225-37, and accompanying text. *Stanley* does not answer the question because the state's interests in *Stanley* were not in adoption of illegitimate children.

134. 441 U.S. 380, 389 (1979); *see supra* notes 108-12 and accompanying text.

135. 441 U.S. 380, 391 (1979).

136. *Id.* at 392.

137. *Id.* at 393.

138. *See supra* note 133.

139. The interest would be sex-neutral only if it also applied to adoptions by stepmothers.

140. 441 U.S. 380, 392-93 (1979).

141. *Id.* at 392.

142. *Id.*

er's. The state would not have to justify its distinction as substantially related to an important state goal because a father who has not participated in childrearing would not have a constitutional interest on the same plane as the constitutional interest of mothers. Even when a father who, like Caban, has exercised custodial responsibilities no longer has custody, his relationship is worthy of the same constitutional protection that a mother's relationship receives. But if a father has not established such a relationship with his children, he cannot complain about differential treatment.

In summary, unwed fathers who are presently exercising or have in the past exercised custodial responsibilities for their children have a constitutional interest in retaining the relationship established by their exercise of custody, and this interest is equivalent to the interests of other parents in their children.¹⁴³ The interests of these unwed fathers are strong enough to require a hearing when the state seeks to remove their children, at least when other parents receive a hearing. In addition, the standard for removal in that hearing must be a fitness standard, at least if that is the standard applied to other parents.¹⁴⁴ Last, even when the state asserts an interest in facilitating adoption of illegitimate children, fathers who have or have had custody of their children¹⁴⁵ are constitutionally entitled to the same procedural and substantive protections that the mothers of their children receive,¹⁴⁶ unless the state can show that the differential treatment is substantially related to an important state interest other than the desire to make sex-based distinctions.¹⁴⁷ Remaining issues are the status of fathers who have not had custody of their children¹⁴⁸ and the possibility that some fathers who have not had custody of their children may have a claim to some constitutional protections.¹⁴⁹

C. *Unwed Fathers Who Have Not Had Custody*

A year before the *Caban* opinion was issued, the Court had dealt with the claim of another unwed father in *Quilloin v. Walcott*.¹⁵⁰ Mr. Quilloin was the unwed father of an eleven-year-old boy whose adoption was sought by the boy's stepfather.¹⁵¹ By decreeing the adoption, the Georgia courts legally terminated any relationship Quilloin may have had with his son and precluded Quilloin from any future attempt at legitimation.¹⁵² The Georgia statutes applicable to the adoption had been construed by the Georgia courts as allowing Quilloin the right to participate in the adoption proceeding both by objecting to the adoption and by presenting his arguments for legitimation of his son.¹⁵³ Quilloin's participation was limited, however, to showing that the adoption would not be in the child's best interests or that legitimation would

143. See *supra* notes 66-97, 103-14, 124-40, and accompanying text.

144. See *supra* notes 77-97 and accompanying text.

145. See *supra* subpart II(A).

146. See *supra* notes 98-137 and accompanying text.

147. See *supra* notes 132-42 and accompanying text.

148. See *infra* notes 150-97 and accompanying text.

149. See *infra* subpart II(D).

150. 434 U.S. 246 (1978).

151. *Id.* at 247.

152. *Id.* at 251 n.11; GA. CODE ANN. § 19-8-14 (1982).

153. 434 U.S. 246, 250 n.8, 253 (1978).

be in the child's best interests.¹⁵⁴ Georgia law provided that a mother of illegitimate children and a father who had legitimated his children by marrying their mother or obtaining a court order of legitimation might block an adoption of the children merely by withholding consent, unless he or she had been proved unfit.¹⁵⁵ The essence of Quilloin's claim was that his relationship with his son entitled him to the absolute power to veto his child's adoption in the absence of a showing of unfitness¹⁵⁶ or at least entitled him to be treated the same as fathers who had formally legitimated their children by marriage or court decree.¹⁵⁷ Quilloin thus relied on the aspect of *Stanley* that required Illinois to establish Stanley's unfitness before it removed his children from his care.¹⁵⁸

Quilloin, like Stanley and Caban, had always declared himself to be the father of his child. In fact, his name appeared on the child's birth certificate.¹⁵⁹ Quilloin also was not a stranger to his child: he had visited the boy on "many occasions," had occasionally contributed to the child's support, and had given the boy presents.¹⁶⁰ Although it is not clear that the child knew that Quilloin was his father, the child "expressed a desire to continue to visit with [Quilloin] on occasion."¹⁶¹ Also, like Stanley and Caban, Quilloin had not taken the steps prescribed by the state to legitimize his son.¹⁶² In all other respects, however, Quilloin's relationship with his child was quite different from Stanley's or Caban's. Specifically, he had never consistently supported the child¹⁶³ and had never "had, or sought, actual or legal custody of his child."¹⁶⁴ Unlike *Stanley*, the adoption did not terminate a current custodial relationship between a father and his son, and unlike *Caban*, the adoption did not terminate a current emotional relationship that had been created during a former custodial relationship. Nevertheless, Quilloin claimed that his interest in retaining his relationship with his son was of the same constitutional significance as Stanley's and could not be terminated by the state without the same substantive justification—proof of his unfitness as a father.

Justice Marshall, for a unanimous Court, noted that any father's interest in the "companionship, care, custody, and management" of his children is "cognizable and substantial."¹⁶⁵ Justice Marshall focused, however, on the fact that Quilloin did not have, had never had, and had never even sought actual or legal custody of his child.¹⁶⁶ Although Justice Marshall validated the Georgia statute as applied to Quil-

154. *Id.* at 254.

155. *Id.* at 248–49.

156. *Id.* at 253, 254–55.

157. *Id.* at 253, 255–56. The Court declined to address the sex discrimination issues that might have been raised by the Georgia scheme because Quilloin failed to raise the issues in his jurisdictional statement. *Id.* at 253 n.13.

158. *Id.* at 247–48.

159. *Id.* at 249 n.6.

160. *Id.* at 251.

161. *Id.* at 251 n.11.

162. He could have married the mother or obtained a court order of legitimation. *Id.* at 249. He did neither, although he finally petitioned for legitimation after the child's stepfather petitioned for adoption. *Id.* at 249–50.

163. *Id.* at 251.

164. *Id.* at 255.

165. *Id.* at 248 (quoting *Stanley*, 405 U.S. 645, 651–52 (1972)).

166. *Id.* at 255.

loin by relying on the state's interests in adoption,¹⁶⁷ his distinction between a custodial father and a noncustodial father indicates that the interests of noncustodial parents have less constitutional significance than the interests of custodial parents. *Caban's* implication that the interests of a father who has never participated in the rearing of his children are not equal to the interests of a custodial mother¹⁶⁸ lends support to this notion. Most recently, the Court has distinguished *Stanley* and *Caban* from *Quilloin* by calling the relationships in *Stanley* and *Caban* "developed" and the relationship in *Quilloin* merely "potential."¹⁶⁹ Since *Quilloin* certainly had a type of developed relationship with his child, the Court's distinction must relate to the special kind of relationship that is developed by the exercise of custodial responsibilities.¹⁷⁰

The Court's response to *Quilloin's* claim that his relationship with his child could not be terminated without proof of his unfitness also focused on the state interests served by the termination.¹⁷¹ Initially, Justice Marshall identified the issue as the degree of protection an unwed father must be given when the interests posed against him are more substantial than were the interests in *Stanley*.¹⁷² In *Quilloin* the state sought to promote the best interests of the child not by removing him from a custodial parent for care by strangers, as in *Stanley*, or even by terminating the father's relationship with the child so that the child could be adopted by strangers. Rather, the termination of *Quilloin's* relationship with his child was a necessary aspect of the state's giving legal validation to the already existing family relationship among the boy, his mother, and his stepfather.¹⁷³ The termination thus served the child's best interests because it made possible the child's adoption by his stepfather with whom he had lived for years and with whom he already had a de facto parent-child relationship.

The Court's response to another claim made by *Quilloin* focused more directly on the difference in interests between custodial and noncustodial fathers. *Quilloin* claimed that his relationship with his child was the same as the parent-child relationship of once-married fathers who no longer live with their children.¹⁷⁴ He argued that the state could not require the consent of noncustodial divorced or separated fathers and dispense with the consent of noncustodial unwed fathers like *Quilloin*.¹⁷⁵ Justice Marshall did not discuss the state's justifications for such a distinction, but stated that the interests of a father like *Quilloin* "are readily distinguishable from those of a separated or divorced father,"¹⁷⁶ and, therefore, the state was not required to give *Quilloin* equal treatment. The difference, according to Justice Marshall, was that *Quilloin* had never had custody of his child and thus had "never shouldered any significant responsibility with respect to the daily supervision, education, protection,

167. *Id.* at 247, 255.

168. See *supra* notes 140-42 and accompanying text.

169. *Lehr*, 103 S. Ct. 2985, 2993 (1983).

170. See *supra* notes 65-137 and accompanying text.

171. 434 U.S. 246, 251, 255 (1978).

172. *Id.* at 248.

173. *Id.* at 255.

174. *Id.* at 255-56.

175. *Id.*

176. *Id.* at 256.

or care of his child.”¹⁷⁷ Moreover, Quilloin had never complained about his “exemption from these responsibilities.”¹⁷⁸ Unlike Quilloin, married fathers have had “full responsibility for the rearing of [their] children,” at least in the past, because marriage imposes that responsibility on both parents.¹⁷⁹ The past exercise of that responsibility sufficiently distinguishes separated or divorced fathers from fathers like Quilloin for purposes of an equal treatment claim.¹⁸⁰ In *Quilloin* the presence of a custodial relationship, even one that has ceased to exist, had great constitutional significance because the lack of a custodial relationship alone justified the state’s distinction between Quilloin and divorced or separated fathers.

Although not certain, it is arguable that marriage itself, regardless of whether the married father has ever exercised actual custody of his child, gives a once-married father the same constitutional interests as married or unmarried fathers who have had actual custody at some time. In *Quilloin* the Court focused on “legal custody” as a central aspect of the marital relationship.¹⁸¹ “Legal custody” implies a right to custody whether or not actual custody is exercised.¹⁸² Further, the Court focused on the legal commitment to the child implicit in marriage to the child’s mother.¹⁸³ The act of marriage constitutes a voluntary undertaking not only to be responsible for financial support of children born of the marriage, but also to be responsible for rearing those children.¹⁸⁴ A married father who has never had actual custody of a child of the marriage has had a legal right to custody of the child and has had a legal responsibility for the child’s custody.¹⁸⁵ It is not the responsibility for financial support, but the responsibility for and right to all the elements of custody—physical possession, guidance, discipline, and material support—that distinguishes noncustodial divorced or separated fathers from noncustodial unwed fathers.

In summary, two basic lessons may be learned from *Quilloin*. First, unwed fathers who do not presently have and have never had custody of their children can make no absolute claim that unless the state proves their unfitness, they must be empowered to veto the adoptions of their children.¹⁸⁶ Second, these unwed fathers also have no claim to equal treatment with separated or divorced noncustodial fathers because the past custody exercised during marriage gives separated or divorced fathers an interest of greater constitutional significance.¹⁸⁷ Considering *Quilloin* and

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See, e.g.,* ARIZ. REV. STAT. ANN. § 8-531(8) (1974) (quoted *supra* text accompanying note 38).

183. 434 U.S. 246, 256 (1978).

184. *See, e.g.,* TEX. FAM. CODE ANN. §§ 11.01(3) (“parent” means one as to whom child is legitimate), 12.02(a)-(b) (child is legitimate child of his or her father when child is born or conceived before or during the father’s marriage to the child’s mother), 12.04 (“parent” has rights and duties that encompass the notion of “custody” and that go far beyond the notion of financial support alone) (Vernon 1975 & Supp. 1982-1983). Justice Marshall explicitly distinguished between the child support obligation of any father, including Quilloin, and the incidents of “actual or legal custody,” *i.e.*, “significant responsibility with respect to the daily supervision, education, protection, or care of the child.” 434 U.S. 246, 256 (1978).

185. 434 U.S. 246, 256 (1978); *see also* CAL. CIV. CODE § 197 (West 1982) (mothers and “presumed” fathers, including married fathers, entitled to custody of the child).

186. *See supra* notes 159-73.

187. *See supra* notes 174-85.

Caban together, it appears that unwed fathers who have had custody in the past can claim equal treatment with currently custodial mothers, and these fathers, like separated or divorced fathers, have interests of greater constitutional significance than those of fathers like *Quilloin*.

The fate of a nondiscriminatory statute that provides for the adoption of children of custodial parents like *Stanley* or once-custodial parents like *Caban* remains uncertain after both *Quilloin* and *Caban*. Neither *Quilloin* nor *Caban* purports to distinguish parents who have had custody from those who have not had custody on the basis of a difference in the minimum treatment the Constitution requires the state to give these parents. Rather, those cases distinguish between parents with custody and fathers who have never had custody in the context of deciding whether equal treatment by the state is required.¹⁸⁸ In *Quilloin* Justice Marshall discussed the difference between the individual interests of fathers who have never had custody and the interests of custodial fathers, but he also noted the very important state interests in promoting the adoptions of children, at least adoptions by spouses of the children's currently custodial parents.¹⁸⁹ In *Caban* those state interests did not justify unequal treatment of men and women with similar interests,¹⁹⁰ but Justice Powell did not answer the question whether equal treatment to the same effect might be justified by state interests. *Stanley* implies strong substantive protection against removals from custodial parents on less than a fitness standard when the state argues that the removal might be in a child's best interests.¹⁹¹ Nothing in *Quilloin* requires expansion of that rule to a situation in which the relationship of a once-custodial parent is terminated to promote the child's adoption by a stepparent with whom the child has been living or by adoptive petitioners with whom the child has been living.¹⁹²

After *Quilloin* the constitutional rights of fathers who have never had custody of their children are also unclear. Justice Marshall, in *Quilloin*, did not say these fathers do not have any claim to constitutional protection; he merely said that they do not have a claim to veto power over their children's adoptions when they have neither had nor sought custody of their children.¹⁹³ *Quilloin* was given notice of and allowed to participate in the proceeding that legally terminated any actual or potential relationship he may have had with his son.¹⁹⁴ He at least had an opportunity both to object to the adoption and to request legitimation and visitation.¹⁹⁵ It is not clear whether he was given an opportunity to seek custody because he made no claim for custody or for an opportunity to seek custody.¹⁹⁶

After *Stanley*, *Quilloin*, and *Caban*, the rights of custodial and formerly custo-

188. See *supra* notes 108-14, 174-80, and accompanying text.

189. 434 U.S. 246, 248, 255 (1978).

190. See *supra* notes 128-37 and accompanying text.

191. See *supra* notes 66-97 and accompanying text.

192. *Quilloin* does imply that removal on general best interests grounds would be offensive. 434 U.S. 246, 255 (1978) (quoting Justice Stewart's concurrence in *O.F.F.E.R.* to the effect that due process would be offended by removal of children from their parents on a general best interests basis, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). But that statement still does not answer the question about the weight of specific state interests.

193. 434 U.S. 246, 254-55 (1978).

194. *Id.* at 249-50, 253-54.

195. *Id.*

196. *Id.* at 255.

dial unwed fathers are firmly established as equivalent to the rights of other custodial and formerly custodial parents, and the rights of noncustodial fathers who have not sought custody are firmly established as being of less significance than the rights of custodial and formerly custodial parents. But if custody is the *sine qua non* for substantial protection, must a biological father at least be given an opportunity to seek custody of his child?¹⁹⁷ And if he must be given an opportunity, of what must it consist: what are his participation rights, and what substantive standards must govern? And, finally, if his request for full custody would be futile and he otherwise has committed himself to his child by taking as much responsibility as he can, must he be allowed to block his child's adoption by withholding consent or at least to present his arguments that the adoption is not in the child's best interests? Discussion of most of these questions must be delayed to part III of this Article, but the last one may be discussed now.

D. *Developed Relationships Short of Full Custody*

1. *Possibility of a Protected Relationship Short of Full Custody*

As previously noted, *Quilloin* has left open some questions about the constitutional significance of the relationship between a child and a father who has never had custody but has otherwise established a substantial relationship with his child. First, *Quilloin* received notice of and participation rights in the proceedings leading to the adoption of his child, and he did not challenge the sufficiency of the procedures accorded him.¹⁹⁸ Therefore, although fathers like *Quilloin* need not be given the power to veto adoptions of their children by the children's stepfathers, the question remains whether parent-child relationships like *Quilloin*'s are significant enough to require the fathers' participation in adoption proceedings as a matter of constitutional law. Second, the status of an unwed father who has not had custody of his child solely because the state has left or placed custody with the mother is unclear. Such a father may have made every possible commitment to the upbringing of his child short of living with the child. The question is whether the relationship established by that kind of commitment comes close enough to the relationship established by full custody to entitle the father to the same level of constitutional protection that custodial fathers like *Caban* or *Stanley* receive. But, more important, the question goes to the substantive protection such a relationship receives even when it is not equal in stature to the relationships of other parents.

If the level of constitutional protection to be given to the interests of noncustodial fathers who nevertheless have substantial relationships with their children depends, as does the protection of custodial parents' interests, on the relationship between the interests and some public good performed by those claiming the interests,¹⁹⁹ it is necessary to consider whether the relationships such fathers have with their children contain the elements of a parent-child relationship that have been

197. The biological connection itself does have constitutional significance. See *supra* notes 43-48 and accompanying text.

198. 434 U.S. 246, 253-54 (1978).

199. See *supra* subpart II(A).

identified as having inherent value. Parental interests in children are not protected because of some inherent value in the biological relationship. These interests are protected, rather, because parents provide for the material and emotional needs of children and because the emotional attachments that are created by the parents' care are inherently valuable and worthy of protection. The biological connection does give rise to an assumption that natural parents will provide for their children's needs, but this connection alone is not sufficient to warrant protection.²⁰⁰

2. *Quilloin's Relationship*

In his opinion for the Court in *Lehr v. Robertson*,²⁰¹ Justice Stevens grouped Quilloin's parent-child relationship with the biological connection of Jonathan Lehr as merely "potential."²⁰² For Justice Stevens, Lehr's merely potential relationship was so different in nature from the developed relationships of married fathers and fathers like Stanley and Caban that Lehr was not even entitled to the basic constitutional protections of notice of and participation in the proceedings leading to the adoption of his child two years after her birth.²⁰³ It is unlikely, therefore, that the potential relationship of a father like Quilloin is of enough constitutional significance to require the state to give him notice of and participation rights in his child's adoption eleven years after the child's birth.

The lack of a "full commitment" to the responsibilities of parenthood in a merely potential relationship was crucial for Justice Stevens.²⁰⁴ If protection for parent-child relationships depends on the degree to which the parent has performed the concomitant responsibilities of parenthood, commitment to those responsibilities is surely an essential element of a protectible interest.²⁰⁵ Furthermore, it is committed performance that gives rise to the emotional attachments that are worthy of protection.²⁰⁶ Disregarding for now the question whether Jonathan Lehr had enough opportunity to commit himself to and perform responsibilities for his child,²⁰⁷ his lack of any relationship with his two-year-old child would offer little evidence of commitment.

Similarly, for eleven years of his son's life, Quilloin not only had never exercised the full custodial responsibilities of living with the child or marrying the child's mother,²⁰⁸ but also had never done anything that evidenced commitment to assist as much as possible in the rearing of the child. He made no commitment to support the child and visited only occasionally and at his own whim.²⁰⁹ He did not seek to take on full custodial responsibilities for the child.²¹⁰ No evidence was

200. See *id.*

201. 103 S. Ct. 2985 (1983).

202. *Id.* at 2993.

203. *Id.* at 2993-95.

204. *Id.* at 2993.

205. See *supra* subpart II(A).

206. See *supra* notes 49-56 and accompanying text.

207. See *infra* subpart III(C).

208. *Quilloin*, 434 U.S. 246, 247 (1978).

209. *Id.* at 251.

210. *Id.* at 255, 256.

presented that his relationship with the boy was any more than that of a family friend or perhaps an uncle. Moreover, there was no evidence of any sense on his part of responsibility for the child's present physical and emotional welfare or future development.²¹¹ Quilloin, like Lehr, had made no discernible commitment to provide for his child's material and emotional needs, to guide and direct the child's development, or to live with the child.²¹² The emotional ties that arise from performance of those acts could not exist between Quilloin and his son. In Justice Stevens' term, the "nature" of Quilloin's relationship was completely different in kind from that of Stanley or Caban.²¹³

The lack of commitment in a relationship like Quilloin's leaves the relationship without any special constitutional significance. Therefore, the state need not refer to any special state interests to justify its failure to notify or provide for participation by fathers like Quilloin in their children's adoptions. A state may choose, as Georgia did, to allow a father like Quilloin to participate in the proceedings leading to his child's adoption,²¹⁴ but it is not required to do so.

3. Other Relationships

Declaring Quilloin to be outside the pale does not, however, dispose of the interests of all noncustodial fathers. Once-married fathers who have never had actual custody of their children are probably entitled to the same protections that custodial parents receive because of the implications for custody in the act of marriage. Marriage implies a full legal commitment to live with, provide for, give guidance to, and establish emotional ties with children of the marriage. The commitment is legally incumbent upon the married father.²¹⁵ For Justice Marshall in *Quilloin*²¹⁶ and Justice Stevens in *Lehr*,²¹⁷ the legal commitment to the custodial responsibilities implied by marriage gives rise to the kind of developed parent-child relationship that is entitled to the highest degree of constitutional protection, regardless of whether the father has exercised actual custodial responsibility. The married father also has officially legitimated his child, an act that appears to be of importance in the Court's lexicon of the good things parents can do for their children.²¹⁸

An unwed father can make a similar commitment by taking advantage of whatever legal process short of marriage is available to him to establish a legally recognized parent-child relationship.²¹⁹ Even in the absence of a legal process whereby a

211. *Id.* at 256.

212. These are all elements of custody. See *supra* subpart II(A).

213. *Lehr*, 103 S. Ct. 2985, 2990 (1983).

214. See *supra* note 153 and accompanying text.

215. See *supra* notes 174-85 and accompanying text.

216. 434 U.S. 246, 256 (1978).

217. 103 S. Ct. 2985, 2994 (1983).

218. See, e.g., *Caban*, 441 U.S. 380, 391 (1979) (removal of the stigma of illegitimacy as a valid state goal in adoption); UNIF. PARENTAGE ACT § 4 (1973) (marriage establishes legal parentage); CAL. CIV. CODE § 7004(a) (West 1983) (marriage establishes legal parentage).

219. Thus, in Georgia, Quilloin could have, at any time during the eleven years before the stepfather's petition for adoption, petitioned for legitimation of his son. Upon a decree of legitimation, his consent would be required for adoption, and he would have the same duties and rights as a married father. *Quilloin*, 434 U.S. 246, 249 (1978); GA. CODE ANN. §§ 19-7-22, 19-7-25 (1982). In California, an unwed father who is not presumed to be the legal father of the child, CAL. CIV. CODE § 7004(a) (West 1983), may independently bring an action to have himself declared the father of the child if the

father can voluntarily make a commitment,²²⁰ he can perform acts that demonstrate his commitment. He can share regularly in the material support of the child, visit the child, and participate in the guidance and direction of the child as much as possible under the circumstances.²²¹ A father who has committed himself to full custodial responsibility and has actually performed as many of the custodial responsibilities as possible appears to fall on the side of Caban, Stanley, and married fathers in Justice Stevens' description of fathers with developed relationships.²²² A father who has made such a commitment would probably be entitled to the substantial constitutional protection that fathers in that category receive.²²³ The question left unanswered by Justice Stevens is whether such fathers' parent-child relationships are so like those of Stanley, Caban, or married fathers that these noncustodial fathers are entitled not only to more protection than fathers like Quilloin and Lehr, but also to the same protection that fathers like Stanley, Caban, and married fathers receive.²²⁴

Equating the interests of an unwed father who has done everything possible to commit himself fully and exercise complete custodial responsibility with the interests of fathers like Caban and Stanley raises a basic problem. A father who has acted as a father to his child as far as possible, but has never lived with the child, does not form the "emotional attachments" that arise from the "intimacy of daily association"²²⁵ and are an essential element of the most carefully protected parent-child

child has no presumed father and even if the child has a presumed father under some circumstances. *Id.* § 7006(b)-(d). In Texas, an unwed father may petition for voluntary legitimation of his child. TEX. FAM. CODE ANN. §§ 13.21-.24 (Vernon Supp. 1982-1983). If the petition is granted, the father will have all the rights of a parent, as though the child were born during his marriage to the mother. *Id.* § 13.09. See *id.* § 12.02 for declaration of parental rights and obligations.

220. In some states, there is no specific method by which an unwed father can voluntarily establish his relationship with his child. In Arizona, for example, the Arizona Supreme Court has recently found that a county attorney has no standing under the state's involuntary paternity statute to bring a paternity action on behalf of an unwed father, rather than opposed to an unwed father. *Sheldrick v. Maricopa County Superior Court*, 136 Ariz. 329, 666 P.2d 74 (1983); *Traphagan v. Maricopa County Superior Court*, 136 Ariz. 331, 666 P.2d 76 (1983) (construing ARIZ. REV. STAT. ANN. §§ 12-84, 3-846 (1982)). In Arizona, it appears that an unwed father may petition for custody of his child either under the state's habeas corpus statute, ARIZ. REV. STAT. ANN. §§ 13-4121 to -4147 (1978), or under the state's version of the Uniform Marriage and Divorce Act, ARIZ. REV. STAT. ANN. §§ 25-331, -332 (Supp. 1983-1984). See, e.g., *Webb v. Charles*, 125 Ariz. 558, 611 P.2d 562 (Ariz. Ct. App. 1980) (natural father filed habeas corpus petition to regain custody of his son from the grandmother and to obtain declaration of his natural parentage). However, both of these procedures presume a request for custody of the child. If the child is in the custody of the mother and likely to remain so, an independent method for an unwed father voluntarily to take on as much legal responsibility as possible does not appear to be available. See Note, *Unwed Fathers: Is Arizona Denying Their Right to Recognition as Parents?* (to be published in ARIZ. L. REV. (1984)).

221. Quilloin could have made such a commitment to his son even in the absence of a legitimation petition. He then would have been much closer to the positions of Stanley and Caban, neither of whom had made any legal commitment to the care of their children. See *supra* notes 66-80, 98-102, and accompanying text. Rather, Stanley and Caban had evidenced their commitments to their children by their actions in exercising custodial responsibility for the children.

222. *Lehr*, 103 S. Ct. 2985, 2993 (1983). "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause." *Id.* (quoting *Caban*, 441 U.S. 380, 392 (1979)). The father may, as did Stanley and Caban, evidence his commitment by acts other than those enshrined in state law.

223. See *Caban*, 441 U.S. 380, 393 (1979).

224. The same protection would consist of equality of treatment with custodial and once-custodial parents. See *supra* notes 77-97, 108-37, and accompanying text. Justice Stevens, writing for the Court in *Lehr*, implied that any father with a developed relationship with his child must be heard before the adoption of the child by another can be decreed. 103 S. Ct. 2985, 2994 (1983). In dissent in *Caban*, Justice Stevens had stated that the procedural protections given to Caban were enough even for a once-custodial father. *Caban*, 441 U.S. 380, 414-15 (1979) (Stevens, J., dissenting). It is doubtful, therefore, that Justice Stevens would advocate complete equality of substantive treatment for all fathers with developed relationships.

225. *O.F.F.E.R.*, 431 U.S. 816, 844 (1977).

relationships.²²⁶ It was these emotional attachments, and not any current exercise of custody, that seemed to equate Caban's interests with those of currently custodial parents.²²⁷ The nature of the parent-child relationship of a father who has performed all of the custodial responsibilities except that of living with the child is clearly of a higher level than Quilloin's or Lehr's because it consists both of commitment to and actual performance of many parental duties. Nevertheless, this relationship cannot be of the same level as that of a father who has performed all of the parental duties and, in particular, who has lived with the child and established the kind of emotional bond that exists between parents and children who live together.

This difference between noncustodial fathers and custodial parents results from a common condition of the relationships between unwed fathers and their children. When the parents of a child are not living together, only one of them will actually live with the child on a day-to-day basis, unless a joint physical custody arrangement has been made. The parents may privately arrange the allocation of physical custody of the child,²²⁸ and in those circumstances the state, of course, will have had no part in the arrangement. If the state does become involved, it may, through its statutes and courts, decide with which parent the child will live.²²⁹ Only when married parents are not formally separated or divorced does the law ever assume that a child is living with both parents and thus in the full custody of both of them.²³⁰ If the state decides with whom the child will live in a contest between parents with equal claims to custody, the ordinary standard will be the best interests of the child.²³¹

Even if an unwed father willing to take full custody of his child has a constitutional right to equal consideration with other parents,²³² a dispute over full custody between him and the mother of the child cannot be resolved by reference to his constitutional interests because hers are as strong.²³³ The neutral best interests

226. See *supra* notes 49-56 and accompanying text.

227. See *supra* notes 103-14 and accompanying text.

228. Thus, in *Lehr*, despite the father's unhappiness with the arrangement, the mother retained sole physical custody of the child without any aid from the state until the time of the stepfather's adoption. 103 S. Ct. 2985, 2994 (1983). And, in *Quilloin*, the mother retained sole physical custody of the child for eleven years of his life without objection from Quilloin, who never sought or obtained custody of the child. 434 U.S. 246, 256 (1978).

229. See, e.g., ARIZ. REV. STAT. ANN. §§ 25-331, -332 (Supp. 1983-1984); CAL. CIV. CODE §§ 4600, 4600.5, 4608 (West 1983 & Supp. 1984); TEX. FAM. CODE ANN. §§ 14.01-.04, .07 (Vernon 1975 & Supp. 1982-1983).

230. See, e.g., *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1959) (child of married couple presumed to be subject to joint control of her parents; court will not intervene between unseparated married couple).

231. See, e.g., statutes cited *supra* note 229; see also H. CLARK, *supra* note 9, § 7.4. Note that California establishes a statutory preference for joint custody and even a presumption that joint custody is in the best interests of the child. CAL. CIV. CODE §§ 4600(b)(1), 4600.5 (West 1983 & Supp. 1984). However, the presumption operates only if both parents agree. *Id.* § 4600.5(a). If they do not, joint custody may be awarded, but it is subject to the general rule requiring determination in the "best interests" of the child. *Id.* §§ 4600.5(b), 4600(b)(1). At this point, the Article is proceeding on the assumption that the unwed father and mother are treated equally under the statutes for determining a custody dispute between them. See *infra* notes 446-58 and accompanying text for a discussion of situations in which the mother may be preferred because of a perception that her rights are of a different level of significance.

232. See *infra* notes 446-58 and accompanying text. The third part of this Article will address the constitutional rights of a father to establish a developed relationship with his child. Right now, in considering the effect of a custody determination between two parents, it is assumed that both have equal constitutional rights.

233. Justice Stevens has stated that the constitutional rights of the mothers and fathers of newborns are not equal because the mother, by virtue of her pregnancy and close association with the child at birth and shortly thereafter, always will have exercised full responsibility for the child's well-being, while the father must take affirmative steps to exercise such responsibility. For Justice Stevens, the positions of mothers and fathers are different, not because of state-imposed differences, but because of natural differences. *Caban*, 441 U.S. 380, 404-09 (1979) (Stevens, J., dissenting). For purposes of this section, however, the assumption is that the mother and father have equal constitutional interests in the custody of their children.

standard that the state ordinarily uses in custody disputes between parents may be open to a variety of attacks,²³⁴ but it is not open to attack on the basis that it denies one of the parents his or her constitutional right to live with the child and develop a parent-child relationship of the highest order.²³⁵ Thus, assuming equal treatment in the custody decision,²³⁶ an unwed father who is fully committed to taking on all the parental obligations often has no way of developing the emotional bonds that arise from day-to-day association and are an element of the most constitutionally significant parent-child relationships.²³⁷ Thus, the nature of such a father's relationship is inevitably different from that of a custodial parent, and the restraints the state may constitutionally place on his relationship are most likely different as well.

First, the principle of equal treatment for parents with equivalent constitutional interests that was so beneficial to *Caban* and *Stanley*²³⁸ will not serve as a simple way to hold the state obligated to give the same treatment to fathers who have not lived with their children that it gives to parents who have actually lived with their children. From *Lehr* it appears that the nature of these fathers' relationships probably entitles them to the procedural protections of notice of and participation in proceedings leading to the adoptions of their children (and, concomitantly, the terminations of the relationships they do have with their children).²³⁹ The extent of procedural protection required is unclear. More important, what state substantive grounds for eradication of these fathers' relationships will satisfy constitutional requirements is also not clear.

Standard procedural protection rules support the conclusion that a father with a substantial constitutional interest in retaining his relationship with his child is at least entitled to participate in the proceeding that will terminate that relationship.²⁴⁰ Justice Stevens, even while dissenting from the conclusion that *Caban* could veto his son's adoption, conceded that *Caban*'s interest was worthy of protection against "arbitrary state action."²⁴¹ The same conclusion is derived from the thesis that private interests

234. See generally Mnookin, *supra* note 14.

235. If only one parent can live with the child and develop the emotional ties that arise upon living together, then, in the case of a conflict brought to the courts, the court must decide between them. An argument that the state must award joint custody, even in the absence of agreement by the parents, is beyond the scope of this Article.

236. See *supra* note 232.

237. For example, assume that the unwed father of a three-month-old child files a petition under ARIZ. REV. STAT. ANN. § 25-331(B)(1)(b) (Supp. 1983-1984) for custody of a child who has been in the mother's custody since birth. The father has done and wants to do everything possible to exercise all custodial responsibilities for the child. He wants to support the child, participate in the child's rearing, and be with the child as much as possible. The mother is willing that the father be involved with the child, but will not agree to any kind of joint custody arrangement. Under Arizona Revised Statutes § 25-332, the court is obliged to decide custody in accordance with the best interests of the child and without regard to the sex of the parents. One very important factor is the child's present "interaction and interrelationship" with his or her parents. *Id.* § 25-332(A)(3). Another is the "child's adjustment to his home." *Id.* § 25-332(A)(4). It is most unlikely that a court charged with making a custody decision in the child's best interests with factors such as these would take an infant from the parent with whom it has lived since birth and place it with a parent with whom it has not lived. The unwed father under these circumstances, given truly equal treatment, can expect at best an order granting him "reasonable visitation" with the child. *Id.* § 25-337(A).

238. See *supra* notes 66-91, 98-137, and accompanying text.

239. See *supra* notes 198-224 and accompanying text. If an interest is of constitutional stature, it ordinarily may not be terminated by the state without the basic protections of notice and opportunity to be heard before the termination is made final. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Also see discussion in *Lehr*, 103 S. Ct. 2985, 2997 (1983) (White, J., dissenting). See *Board of Regents v. Roth*, 408 U.S. 564 (1972), for an explanation of the necessity for defining an interest as one to be protected.

240. See *supra* note 239. The implication of Justice Stevens' opinion in *Lehr* is that fathers with developed relationships have the right to make their opinions known about where the best interests of their children lie. 103 S. Ct. 2985, 2993 (1983). See also *Caban*, 441 U.S. 380, 414-15 (1979) (Stevens, J., dissenting) (developed relationship entitled to protection against arbitrary state action; best interests standard sufficient).

241. *Caban*, 441 U.S. 380, 414-15 (1979) (Stevens, J., dissenting).

must be balanced with public goods in defining protected parental interests because the constitutional stature of those interests depends on the degree to which parents have performed the basic social functions that underlie the interest itself.²⁴² Fathers who have openly committed themselves to full custodial responsibilities and have exercised all of the custodial responsibilities that are available to them have performed a number of the functions of custody and are, perforce, the possessors of a constitutional interest in retaining their relationships with their children. Because of the status of these fathers' interests, in the second stage of analysis, when the state's interest in preventing their participation must be measured against their protected interests,²⁴³ the state does not fare well.

As in *Stanley*, the state could not argue that these fathers may be presumed to be strangers to and unconcerned with their children as a justification for not allowing their participation.²⁴⁴ As in *Caban*, the state also could not argue the difficulty of locating and identifying these fathers as a justification for not allowing their participation.²⁴⁵ Finally, if the state's argument were that such a father's participation would add nothing to a determination of the child's best interests (if that is the substantive standard to be used),²⁴⁶ it is likely that the Court would consider the elimination of the views of a committed and responsible parent who stands ready to take full custody of his child as diminishing greatly the likelihood of an accurate determination of where the child's best interests lie.²⁴⁷

The more difficult question is what substantive standard must be required of the state when it seeks to terminate the developed relationship between a child and a committed father who has performed as many of the custodial responsibilities as he can, but who, because of conflict with a custodial mother, has not been able to live with the child.²⁴⁸ In ordinary constitutional terms, the substantive standard required would be determined by measuring the state's substantive reasons for terminating the father's relationship against his constitutional interests.²⁴⁹ But if the denomination of his interest as a constitutionally protected one has depended on a prior consideration of how protection of his private interests will further the constitutional values un-

242. See *supra* subpart II(A).

243. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Mathews* the Court set out three factors to be considered in determining the content of the procedures to be afforded:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

424 U.S. 319, 335 (1976).

244. See *supra* notes 87-97 and accompanying text.

245. See *supra* notes 129-37 and accompanying text.

246. In *Lehr* Justice Stevens noted that an unwed father who had had no relationship with his child would probably have nothing to add to the determination of the child's best interests. 103 S. Ct. 2985, 2995 n.22 (1983).

247. Rather, such a father would be knowledgeable about the wishes of the child, the relationship and interaction of the child with his parents, the child's "adjustment to his home, school and community," and the "mental and physical health of all individuals involved." All of these are factors to be considered in a determination of the child's custody in his best interests in Arizona. ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1983-1984).

248. See *supra* notes 219-37 and accompanying text.

249. See *supra* notes 58-64 and accompanying text; see also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

derlying protection of parental rights,²⁵⁰ consideration of state interests may not have to enter in at all.

Thus, if a state terminates or disregards the interests of committed fathers just because the state concludes that it is best for children not to have relationships with their unwed fathers, the basic values promoted by such a father's relationship that defined it as constitutionally significant in the first place should also preclude the use of a best interests standard. On the other hand, the Court has flatly required a fitness standard only in *Stanley*, in which the state was removing children from a parent's full custody to place them in foster care.²⁵¹ In *Stanley* the Court did declare at one point "that all Illinois parents are constitutionally entitled to a hearing *on their fitness* before their children are removed from their custody."²⁵² Stanley's relationship with his children was constitutionally protected precisely because he was assumed to be exercising full custodial responsibility, a basic value reflected in the right/duty notion of parent-child relationships. The state could not base its action on a precisely contrary conclusion that custodial relationships between unwed fathers and their children are not protected. The problem is twofold: first, one must determine whether the state interests asserted as being served by a particular substantive standard are precluded because they conflict with the constitutional values that underlie the protection given to the relationship; and second, if the state interests are not so precluded, they must be weighed against the interests in the relationship itself.²⁵³ The situation is analogous to that noted by the Court in dicta when it said that the Constitution would be "offended" if the state "were to attempt . . . the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."²⁵⁴

If, however, the state proposes to terminate or disregard the unwed father's relationship on a best interests standard because the termination is to be effected by the adoption of a child or will lead to the adoption of a child, the state's justifications for a best interests standard may not be viewed so lightly. On one side is an unwed father who has evidenced his full commitment to his child by taking advantage of whatever legal process is available to acknowledge himself as a committed father, by actually participating in custodial responsibilities as far as possible, or by doing both. He would assume full custody, including living with the child, but for the mother's full custody. He wants to retain the relationship he already has with the child and is willing to turn it into a parent-child relationship of the highest level at any time that option is available to him. He, of course, objects to adoption of his child by another. On the other side is the state's desire to promote the adoption of the child by another as smoothly as possible.

The easiest way to effect an adoption would be to disregard the interests of the

250. See *supra* notes 58-64 and accompanying text.

251. 405 U.S. 645, 658 (1972).

252. *Id.* (emphasis added).

253. See *supra* notes 58-64 and accompanying text.

254. *Quilloin*, 434 U.S. 246, 255 (1978) (quoting with approval *O.F.F.E.R.*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). The *O.F.F.E.R.* language was also quoted with approval in *Santosky v. Kramer*, 455 U.S. 745, 760 n.10 (1982).

father and proceed with a consideration of whether the adoption would be in the best interests of the child.²⁵⁵ Since a committed father is constitutionally entitled to participate in a proceeding that will result in the termination of his relationship with his child,²⁵⁶ however, the state may not completely disregard the father's interest. At the least, the state must take into account the father's argument that it would not be in the child's best interests to terminate his relationship with the child, and the state may terminate the relationship only on a finding that it would be in the child's best interests to do so. The relationship as described is one of constitutional stature,²⁵⁷ and it may not be ignored. Furthermore, even if the unwed father has not taken legal steps to announce his commitment publicly, his open acts of participation in custodial responsibilities for his child would distinguish him from fathers like Quilloin and Lehr who did not legally acknowledge their children or evidence any actual commitment to the children.²⁵⁸ Rather, as implied by *Lehr*, a father with a noncustodial but developed actual relationship would at least be entitled to a consideration of the relative benefits and detriments to the child of the termination of his relationship with the child.²⁵⁹

A best interests standard, however, is of little comfort to an unwed father. While a court, mandated to decide in its discretion a child's best interests, may be required to consider the value to the child of retaining a relationship with the father, other factors, such as the relative wealth of the adoptive parents, their situation as a "normal, two-parent" family,²⁶⁰ the advantages of legitimation (if the unwed father has not legitimated his child), and the advantages of legally securing for the child a home with two fully committed, fully custodial parents will weigh quite heavily against the father. As in *Caban*, a best interests standard would most often result in the termination of the father's existing relationship with his child.²⁶¹ That is why, of course, the father would argue, like *Caban*,²⁶² Quilloin,²⁶³ and Stanley,²⁶⁴ that the state must prove his unfitness before terminating his relationship with his child.

The situation may arise either when the mother has already consented to the child's adoption²⁶⁵ or when her parent-child relationship has been terminated.²⁶⁶ If the proposed adoption is by someone other than the mother's spouse, a general best interests standard does not satisfy constitutional requirements. In that instance, the state may want to promote several interests by the adoption, all of which it will include in the factors of a best interests determination and all of which support the use of a discretionary best interests standard. Among these interests are several the Court

255. Without the requirement of consideration of the father's interests, the court is much more likely to consider the child's best interests to be served by adoption, particularly when the adoption is by the child's stepfather.

256. See *supra* notes 240-47 and accompanying text.

257. See *supra* notes 215-24 and accompanying text.

258. See *supra* notes 202-14, 215-24, and accompanying text.

259. 103 S. Ct. 2985, 2994 (1983); see *supra* notes 215-24, 240-47, and accompanying text.

260. *Caban*, 441 U.S. 380, 391 (1979).

261. *Id.* at 384-87.

262. *Id.* at 385.

263. *Quilloin*, 434 U.S. 246, 253 (1978).

264. *Stanley*, 405 U.S. 645, 646-47 (1972).

265. See, e.g., ARIZ. REV. STAT. ANN. § 8-106(A)(1)(c) (Supp. 1974-1983).

266. See, e.g., *id.* § 8-106(A)(1)(b).

has specifically determined to be legitimate interests of the state in the child welfare context. The state wants to be free to consider these interests at its will against the constitutional interests of the father in retaining his relationship with his child. One interest is legitimation of the child.²⁶⁷ Another is the provision of a "normal, two-parent home" for the child.²⁶⁸ Another is the provision of a permanent and stable legal placement for the child with a family committed to the child and by virtue of which the child will develop the emotional ties that arise from intimate daily association.²⁶⁹ Only the last of these state interests is directly related to the balancing that goes into the definition of a constitutionally protected parent-child relationship.²⁷⁰ And, of course, it is precisely the day-to-day association and the emotional ties arising from it that the unwed father has been unable to accomplish.²⁷¹ However, the only reason this hypothetical father has been unable to live with his child and establish emotional ties is that the child's other parent, the mother, has been living with the child. The mother has been living with the child, not because of a superior constitutional right, but because of a necessary resolution of an irreconcilable conflict between two persons with equal right to a full custodial relationship with the child.²⁷² In the context of adoption by strangers, however, the very condition that has prevented the father from entering into the relationship that would equate his interests in constitutional terms with parental interests of the highest category is missing. The mother is out of the picture. The only obstacle to the father's taking full custody and establishing emotional ties now is the state's desire to place the child with strangers. Because of his biological connection with the child and the developed relationship established by commitment and participation in the child's rearing to the extent possible, all of the constitutional values reflected by protection for the parent-child relationship are met by preserving his relationship and allowing him to take full custodial responsibility for the child.²⁷³ The state's argument for power to make a best interests determination about whether the child's needs for day-to-day association with permanent caretakers would best be met by retention of the father's relationship and extension of it to a full custodial relationship or by placement in a permanent adoptive home with strangers has already been denied by the allocation that defined the father's interests as constitutionally significant.²⁷⁴

Justifications for a best interests standard that derive from the state's interests in legitimation of children born out of wedlock and provision of normal, two-parent families for children neither conflict with nor add to the public interests that underlie

267. *Caban*, 441 U.S. 380, 391 (1979).

268. *Id.*

269. *Id.*; see also *Lehr*, 103 S. Ct. 2985, 2995 n.22, 2996 n.25 (1983); *Quilloin*, 434 U.S. 246, 255 (1978).

270. See *supra* notes 49-56, 103-14, and accompanying text.

271. See *supra* notes 225-37 and accompanying text.

272. See *id.*

273. When the father takes on full custodial responsibility, the one missing element in his relationship with his child will be supplied. See *supra* subpart II(A).

274. This conclusion concededly rests on a notion that such a father has never done anything or omitted to do anything that would warrant denial of his opportunity to take on full custodial responsibility for his child, and it also rests on an assumption that a father who already has a developed relationship with his child has a constitutional right to the opportunity to turn that relationship into one of the highest order. That opportunity interest is the subject of part III of this Article.

a constitutionally protected parent-child relationship—interests in providing for the child's material and emotional needs, giving the child guidance and direction, and fostering the emotional attachments that arise from daily association.²⁷⁵ Thus, these state interests have not already been considered in the constitutional balancing. Neither legitimacy nor a two-parent home is required for the public good that is provided by protecting parent-child relationships. Although the Court has declared these state goals to be worthy of consideration under a best interests standard,²⁷⁶ they were not enough to justify unequal treatment of Caban, a father who had lived with his children in the past.²⁷⁷ They also are probably not enough to justify the use of a best interests standard for termination of the private interests of a committed, involved father who will, absent termination, become a fully custodial father. Too many alternatives are available to the state that will not destroy the already established relationship.²⁷⁸ The harm to the father's established and potential relationship with his child caused by termination is certain and decisive and, therefore, termination should not be permitted when other less harmful methods of furthering the state's interests are available.

Last, adoptive placement with strangers creates more risk that the child will not be assured of the permanence and stability of living with committed caretakers with whom the child will establish enduring emotional attachments than does allowing a father with a developed relationship to assume full custody. The father has already established a parental relationship with the child through his commitment and actual involvement, and allowing him to take on the one remaining element of custodial responsibility that will result in the emotional attachments between a parent and child who have lived together on a day-to-day basis will best assure the child's future welfare.²⁷⁹ In this situation, then, reference to the constitutional values served by protecting the father's relationship precludes use of a pure best interests standard. Only if the father is found to be unfit to take custody of the child, without considering the relative qualifications of the adoptive parents or the relative values of adoption, may the state choose adoptive placement with strangers over retention and strengthening of the father's relationship with the child.

When the child's stepfather is the petitioner for adoption, the state's justifications for a best interests standard are much stronger.²⁸⁰ This conclusion holds

275. See *supra* subpart II(A).

276. See *supra* notes 267-69 and accompanying text.

277. See *supra* notes 128-37 and accompanying text.

278. For example, in Arizona, the legislature has simply declared all children to be the legitimate children of their natural parents. ARIZ. REV. STAT. ANN. § 8-601 (Supp. 1974-1983). In California, an unwed father who lives with his child and openly holds the child out as his own establishes a presumption of legal parentage without more. CAL. CIV. CODE § 7004(a)(4) (West 1983). The provision of a "normal, two-parent home" certainly carried little weight in *Caban*, even when, as in that case, the "normal" home was with the child's natural mother and stepfather. 441 U.S. 380, 391-92 (1979). Any unwed mother who is caring for her child alone, of course, is not providing her child with a "normal, two-parent home." Professor Hafen calls the relationship between an unwed mother and her child a "second choice" arrangement, but one entitled to constitutional protection nonetheless. Hafen, *supra* note 41, at 496.

279. See *supra* subpart II(A).

280. This is the kind of adoption that was at issue in *Caban*, 441 U.S. 380 (1979), *Quilloin*, 434 U.S. 246 (1978), and *Lehr*, 103 S. Ct. 2985 (1983). The difference is in the level of the father's constitutional interest. See *infra* notes 470-86 and accompanying text for a discussion of how these issues can arise in an adoption by strangers.

even though the unwed father's parent-child relationship is developed²⁸¹ because he has committed himself to complete responsibility for his child and has been precluded from actually exercising complete responsibility, including living with the child, only because the child's mother is the parent with whom the child has been living.²⁸² When the parent with whom the child has been living is the mother, only drastic circumstances will justify a change in living arrangements.²⁸³ In a stepparent adoption, when the natural parent living with the stepparent has continuing complete custody of the child and remains fit, the natural parent who is not living with the child will not be able to assume complete custody of the child whether or not the adoption is granted. By decreeing the adoption, therefore, the state will not be denying a noncustodial unwed father the opportunity to become a father like Caban or Stanley. Other circumstances have foreclosed that opportunity. Because one of the essential elements of the most carefully protected parent-child relationships is missing from the unwed father's relationship and because the state's action in decreeing the adoption does not itself preclude the father from supplying the missing element, the state's use of a best interests standard is not at odds with the values already given paramount weight in the constitutional analysis.²⁸⁴ Thus, the constitutional protection given to the unwed father does not preclude the use of a best interests standard.²⁸⁵

On the other hand, the state's purposes in using a best interests of the child standard to decide between retaining the present parent-child relationship of the unwed father or decreeing adoption by the stepfather are apparent. If the adoption is decreed, the child will remain with the mother, but what already may be a de facto complete parent-child relationship between the child and the stepfather will be legally validated.²⁸⁶ The child has probably been living with the stepfather for some time and will most likely continue living with him in the future. The stepfather's petition to adopt is good evidence of a commitment to be a parent to the child in the fullest sense. Only the adoption decree, the law's substitute for a biological connection, is lacking. In Justice Marshall's words, "the result of the adoption in this case is to give full recognition to a family unit already in existence."²⁸⁷ The state's use of a best interests standard indicates that due weight will be given to the already established relationship between the child and his or her natural father, a relationship that may be so important to the child that it should be retained even at the expense of the adoption.

281. This characterization derives from *Lehr*'s distinction between "developed" and "potential" relationships. 103 S. Ct. 2985, 2993 (1983).

282. See *supra* notes 215-37 and accompanying text.

283. See, e.g., *Black v. Black*, 114 Ariz. 296, 560 P.2d 800 (1977) (modification of custody order only if material change in circumstances affecting the welfare of the child); ARIZ. REV. STAT. ANN. §§ 25-332(B), -339 (Supp. 1983-1984).

284. See *supra* subpart II(A); see also *supra* subpart II(B). Note the difference in the state's role in this situation and the one discussed *supra* notes 260-79.

285. The following are other commentators who have focused on the existence of a de facto family relationship with another as the critical element in determining whether adoptions should occur in the absence of parental unfitness or consent: Bodenheimer, *supra* note 121, at 53-65; Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 86-87, 108-13 (1979); Ketcham & Babcock, *supra* note 57, at 536-42, 549-56; Note, *In the Child's Best Interests: Rights of the Natural Parents in Adoption Proceedings*, 51 N.Y.U. L. REV. 446, 468-73 (1976); Note, *Unwed Fathers*, *supra* note 57, at 105-12, 135-40.

286. See *Quilloin*, 434 U.S. 246, 255 (1978), for use of this interest.

287. *Id.*

However, in the absence of a parent-child relationship of the highest order and in the absence of state action or purposes that conflict with the resolution of values achieved by constitutional analysis, the state may, indeed should, resolve the conflict by consideration of the relative value to the child in retaining either relationship.²⁸⁸

In *Caban* the Court determined that a best interests standard could not be used as the standard in the adoption proceeding initiated by the stepfather of Caban's children.²⁸⁹ Caban, however, had actually lived with his children in the past and had thus established the emotional attachments to which the Court has given the highest level of protection.²⁹⁰ Further, *Caban* was an equal treatment case. Because Caban and the mother of his children had relationships with their children of equal constitutional significance, the state had to treat them equally.²⁹¹ Therefore, because the mother could veto the adoption of the children, the state had to give the father the same power. *Caban* thus does not preclude the possibility that a neutral statute providing for a best interests standard for terminations in stepparent adoption situations would be valid even against a father like Stanley or Caban when the child is living with the parent whose spouse is the petitioner.²⁹²

E. Summary

Constitutional protection for the relationship between biological parents and their children is inextricably linked to parental performance of the duties included in the term "custody": provision for the physical and emotional needs of children, provision of guidance and direction to children, and living with children on a day-to-day basis. Part of that protection relates to the emotional attachments that develop between children and their parents when they live together and the parents perform their custodial duties in the environment of a shared home. That kind of relationship can exist between unmarried fathers and their children, as well as between other

288. A discussion of the argument that retention of both relationships is best for the child is beyond the scope of this Article. However, that was presumably the result in *Caban*, 441 U.S. 380 (1979), where the Court's declaration that Caban, a once-custodial father, must be given the power to veto the adoption of his children by their stepfather ensured the retention of their relationship with him and, presumably, retention of their relationship with their stepfather would result from continuing full custody in their mother. Recall, however, that Caban, unlike the father being discussed in the text, had already established a complete relationship with his children because he had lived with them and thus already had a constitutionally protected interest of the highest order. See *supra* notes 98-137 and accompanying text.

289. See *supra* notes 98-137 and accompanying text.

290. See *id.*

291. See *id.*

292. See *supra* notes 113-14 and accompanying text. In the course of this Article's discussion of *Caban*, 441 U.S. 380 (1979), it was implied that *Caban* appeared to go beyond a consideration of the gender distinctions made by New York's statutes. See *supra* notes 108-14 and accompanying text. The implication was that the relationship between Caban and the children for whom he had once had full custodial responsibility was of the same constitutional significance as any current custodial parent-child relationship and thus could not be given differential treatment on the mere basis of being of less constitutional significance, even if the distinction were based on having or not having custody, rather than on gender. The suggestion made in the text at this point would, under that theory, require closer attention to the second stage of analysis, *i.e.*, to the state's purpose of giving legal validation to the current and likely to continue *de facto* relationship between the child and his or her stepfather. See *supra* notes 126-40 and accompanying text. Thus, a gender neutral statute that provided for a lesser substantive standard in stepparent adoptions would survive not because the constitutional interests of a once-custodial parent were of less significance than those of a currently custodial parent, but because the state's interests in legal validation of the current and likely to continue relationship between the child and the child's stepfather were strong enough to prevail over the natural father's interest despite its constitutional significance. See, *e.g.*, *supra* notes 215-91 and accompanying text.

parents and their children. When it does, the unmarried fathers are entitled at least to equal treatment with other parents who have or have had custodial relationships with their children.

When unwed fathers have voluntarily failed to perform the custodial responsibilities that give rise to constitutional protection for parental rights, the state need not consider their interests because they are not of constitutional stature. Sometimes, however, the father does develop a relationship with his child that evidences a full commitment to all parental responsibilities, but cannot assume all of the responsibilities because the mother's interests conflict with his. Such a father cannot rely on a claim to equal treatment because his relationship with his child is not the same as that of other parents. Nevertheless, consideration of the values underlying constitutional protection for parent-child relationships leads to the conclusion that such a father's relationship is a protected one. Whether it prevails against the state interests in promoting adoption in a particular case depends, first, on whether the state's interests in adoption conflict with the constitutional values served by protecting the father's relationship and, second, if there is no conflict, on whether the father's interests are stronger than the state's. When the father, whether or not the child is adopted, cannot perform all of the custodial functions and the prospective adoptive parent can (and perhaps has already), the state's interests do not conflict with the constitutional values and probably will prevail over them. But when the father, if the child is not adopted, can perform all of the custodial responsibilities, the state's interests in adoption by another conflict with the constitutional values underlying protection for biological parents and probably will not prevail.

III. THE OPPORTUNITY INTEREST²⁹³

A. *Introduction to the Opportunity Claim*

As can be seen from the discussion of the unwed father's protections against state-decreed adoptions by strangers,²⁹⁴ the unwed father's claim frequently will be for an opportunity to perform the acts that give rise to a parent-child relationship of the highest constitutional significance. Recognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility,²⁹⁵ the state may not deny biological parents the opportunity to establish a protected custodial relationship.²⁹⁶ Without this opportunity, the protected relationships discussed in part II will never arise. Goldstein, Freud, and Solnit describe the opportunity interest as the interest in developing the important psychological parent-child relationship by continuous parental nurturing of the child.²⁹⁷ In constitutional terms, if it is the custodial relationship between a biological parent and a child that is critical, the state may not prevent the develop-

293. The term "opportunity" was used by Justice Stevens in *Lehr*, 103 S. Ct. 2985, 2993 (1983).

294. See *supra* notes 260-79 and accompanying text.

295. See *supra* subpart II(A).

296. See *infra* subparts III(B)-(C) for discussion of what the Court has said about opportunity claims.

297. GFS II, *supra* note 14, at 11.

ment of a custodial relationship by denying an unwed father an opportunity to have custody, unless the state provides justifications that would validate state denials of custody to parents in general.²⁹⁸ Given the probable strength of state interests in adoption,²⁹⁹ the state must at least give all biological parents equal opportunities to establish and maintain protected relationships with their children.³⁰⁰

The opportunity interest is the claim made on the strength of the biological connection alone.³⁰¹ As Justice Stevens said for the Court in *Lehr*, "the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."³⁰² Claims for constitutional protection generally have been unsuccessful when the claimant has lacked a biological connection.³⁰³ However, because only some special kinds of parent-child relationships are of constitutional significance and all of those special relationships require more than a biological connection,³⁰⁴ the success of the opportunity claim depends on the kind of parent-child relationship the unwed father wants to or can establish.³⁰⁵

Further, the timing of the opportunity claim may be of utmost importance. In *Lehr* the natural father, who had not established a developed relationship with his child in the two years of her life,³⁰⁶ was in effect complaining that the state's failure to provide for his participation in the proceedings leading to her adoption by her stepfather cut off his opportunity to establish a protected relationship with his child.³⁰⁷ In response, the Court referred to the state's statutory method for fathers like *Lehr* to make their desires to establish relationships with their children known to the state.³⁰⁸ *Lehr* had never taken advantage of that opportunity.³⁰⁹ *Lehr*'s argument,

298. Justifications would consist of, for example, a finding of unfitness, *see supra* notes 74-75 and accompanying text, or a finding that the child's best interests precluded custody in a situation in which parents of equal right are both seeking custody. *See supra* notes 225-37 and accompanying text.

299. *See supra* notes 267-71, 286-88, and accompanying text.

300. *See supra* notes 95-137, 174-92, 215-39, and accompanying text. Justice Stevens has said in dissent that the mothers and fathers of newborn children have naturally different relationships with their children, and, therefore, the state may take account of those differences when it seeks to promote the adoption of newborn children because the distinctions are innate, rather than state-imposed. *Caban*, 441 U.S. 380, 404-07 (1979) (Stevens, J., dissenting). However, that distinction would appear to take no account of an opportunity interest arising by virtue of the biological link alone, and it is that interest to which Justice Stevens appeared to be referring in his majority opinion in *Lehr*, 103 S. Ct. 2985, 2993 (1983), and which is the subject of the rest of this Article.

301. In the constitutional analysis, the biological claim is the one aspect that seems to hold regardless of various public benefits. *See supra* subpart II(A). Biological parents who do good things for their children have constitutionally protected interests in maintaining their relationships with their children. Others who perform the same functions do not receive the same protections. *See supra* notes 44-48; *see also* GFS I, *supra* note 14, at 16 ("The so-called blood-tie gives them first right to the possession of the child."). The biological aspect of the natural parent's right, then, does not require a balancing between private interests and public goods. *But see* Hafen, *supra* note 41, at 473-507 (kinship itself of value, although kinship relationships within traditional marriage are preferred).

302. 103 S. Ct. 2985, 2993 (1983).

303. *See supra* note 301.

304. *See supra* subpart II(A).

305. *See infra* notes 412-40 and accompanying text.

306. 103 S. Ct. 2985, 2987-89 (1983).

307. *Id.* at 2985, 2990.

308. *Id.* at 2994-95.

309. *Id.* at 2998. *Lehr* could have simply registered himself as a person interested in claiming paternity of the child. He would then have received notice of and participation rights in the adoption proceedings. The categories of fathers entitled to notice are set out in *Lehr*. *Id.* at 2988 n.5 (quoting N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1983-1984)). The quoted statute makes plain that fathers receiving notice were entitled only to present their view of the child's best interests. N.Y. DOM. REL. LAW § 111-a(4) (McKinney 1977 & Supp. 1983-1984).

however, was not that the state had always precluded him from evidencing his commitment and establishing a relationship, but that the state's decree of adoption without considering his interests now denied him any opportunity to establish a relationship with his daughter.³¹⁰ The Court's denial of Lehr's claim was based as much on the timing of his claim as on the adequacy of the procedures afforded by New York to unwed fathers who want to develop relationships with their children.³¹¹ The point in time at which the state acts to preclude the natural father from ever turning his "inchoate interest in establishing a relationship"³¹² into an actual relationship has a great impact on the decision whether or not the state has acted in violation of the Constitution.

An opportunity claim may be made when a child is a newborn or many years later.³¹³ It may be made for opportunity to increase an already developed relationship³¹⁴ or for opportunity to establish a relationship.³¹⁵ The timing of the claim and the exact nature of the relationship that the father wants to establish are the essential considerations underlying this Article's conclusions about whether opportunity interests should receive constitutional protection against state action that will curtail them.³¹⁶ Denial of an opportunity claim followed by termination or adoption will be permanent and irrevocable.³¹⁷ Without the opportunity to develop a significant parent-child relationship, the unwed biological father will never achieve the kind of constitutionally significant relationship Caban and Stanley had with their children. When it is the state that denies the opportunity, it may, by its denial, be impermissibly interfering with constitutional rights.

B. Stanley and the Opportunity Interest

1. Stanley's Message

While Stanley³¹⁸ dealt specifically with the interests of an unwed father in maintaining his already existing custodial relationship with his children,³¹⁹ the logic of the theory underlying the case and some of the Court's language support a conclusion that any unwed father must be given the opportunity at least to claim custody of his children and to demonstrate his qualifications for custody. Footnote nine of the opinion is the source of this argument:

We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at

310. See *supra* notes 1-10 and accompanying text.

311. See *infra* notes 377-411 and accompanying text; see also 103 S. Ct. 2985, 2995 n.23 (1983) (Justice Stevens referred to the adoption petition (and decree) as analogous to the running of a statute of limitations).

312. 103 S. Ct. 2985, 2995 (1983).

313. See *infra* notes 377-411 and accompanying text.

314. See *supra* notes 265-79 and accompanying text.

315. See *infra* subparts III(B)-(C).

316. See *id.*

317. See *supra* notes 4-25 and accompanying text.

318. 405 U.S. 645 (1972).

319. See *supra* notes 66-97 and accompanying text.

some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law . . . provides for personal service, notice by certified mail, or for notice by publication . . . Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the state. Those who do respond retain the burden of proving their fatherhood.³²⁰

The language of this footnote has been construed consistently as a requirement that the procedural protections of notice and hearing be extended not only to fathers who have already established relationships with their children, but also to fathers who have not yet established relationships with their children and now want to do so.³²¹ Much of the debate over *Stanley* has concerned the requisite form of procedural protections it offers fathers who do not have existing relationships with their children.³²²

Footnote nine, however, does not talk only about procedural protections for unwed fathers; it also posits a right to a "hearing on fitness" for unwed fathers "who desire and claim competence to care for their children."³²³ That language indicates that a father who wants custody of his children, whether or not he has or has had custody, must be given the opportunity to demonstrate his basic competence to do so, not just an opportunity to argue that the children's best interests require placement with him.

Lehr,³²⁴ while limiting the broadest reach of possible protection for the opportunity interest, does not raise doubt about its viability as a constitutionally significant interest. In fact, Justice Stevens declared:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent/child relationship and make uniquely valuable contributions to the child's development.³²⁵

Lehr is important, not because it declares that there is no constitutionally protected opportunity interest, but because it limits the situations in which the state must take account of a father with only an opportunity interest. Thus, *Lehr* must be analyzed at length for an understanding of the nature and strength of the unwed father's interest in developing a protectible relationship with his children.

320. 405 U.S. 645, 657 n.9 (1972).

321. See, e.g., Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527, 528 (1975); Bodenheimer, *supra* note 121, at 53-56; Note, *Unwed Fathers: An Analytical Survey*, *supra* note 121, at 1045-47; Note, *Unwed Fathers*, *supra* note 57, at 127-40; Comment, *supra* note 57, at 99-101.

322. See, e.g., Bodenheimer, *supra* note 121, at 62-76; Barron, *supra* note 321.

323. 405 U.S. 645, 657 n.9 (1972).

324. 103 S. Ct. 2985 (1983).

325. *Id.* at 2993-94.

2. Stanley and Participation Rights

As mentioned above, most of the debate over *Stanley* has concerned the apparent requirement in footnote nine that the state must attempt to notify all unwed fathers of proceedings, including adoption proceedings, affecting their actual or potential relationships with their children.³²⁶ This requirement is derived from the elementary rule that the state may not cut off people's constitutional (or state-granted) interests without letting them know of its proposed action so that they may have an opportunity to argue against the loss of their interests.³²⁷ If a father has a viable opportunity interest in establishing a relationship with his child, the state may not terminate his interest by decreeing adoption without giving the father an opportunity to make his claim.

Although some unwed fathers may not have any continuing interest in their actual or potential relationships with their children, the rule requires that the fathers be notified unless official evidence of their lack of interest exists. Examples of official evidence are a prior adjudication that the putative father is not the child's father, adjudication terminating the father's interest, a properly executed consent to adoption, and a waiver of interest.³²⁸ Most of the debate has focused not on the general requirement of notice but on what constitutes a reasonable attempt at notice. It is a basic rule that the state is not bound to notify in fact when actual notice is impossible.³²⁹ Further, as a corollary, several commentators have argued that no attempt at notice need be made when the attempt would be futile.³³⁰

326. See *supra* notes 320-22 and accompanying text.

327. See *supra* notes 240-47 and accompanying text.

328. Thus, the California scheme requires consideration of an alleged father's parental rights (and consequent notification of all men identified as possible fathers) unless the alleged father has, in writing, denied paternity, waived his right to notice, voluntarily relinquished the child for adoption, or consented to adoption, or unless the man's relationship with the child has been terminated or determined not to exist. CAL. CIV. CODE § 7017(b) (West 1983). Because California does not require notification of truly unknown or unlocatable fathers, *id.* § 7017(a)(1), (f), no notification, even the spurious notice afforded by publication, will be given to some fathers.

Perhaps Arizona's scheme is more nearly in conformity with this "ordinary" rule. See ARIZ. REV. STAT. ANN. §§ 8-111, -535 (Supp. 1974-1983); ARIZ. R. CIV. P. 4(e)(1), (e)(3). In Arizona an attempt has to be made to notify even truly unknown fathers.

The Uniform Parentage Act does not require notification of truly unknown fathers, but it does require notification of an identified but unlocated father via provisions for the constructive notice of publication. UNIF. PARENTAGE ACT § 24(f) (1973).

A scheme like Arizona's may be of little effect because it lacks any procedure for formal inquiry of the mother about the father's identity or location. ARIZ. REV. STAT. ANN. § 8-107 (Supp. 1974-1983) (formal requirements for mother's consent do not include identification of father). The Uniform Parentage Act requires the testimony of the mother, under oath, about the father's identity and whereabouts. See UNIF. PARENTAGE ACT §§ 10(b), 24(b) (1973); see also Barron, *supra* note 321, at 535-39; Krause, *Uniform Parentage Act*, 8 FAM. L.Q. 1, 18 (1974).

329. See, e.g., Barron, *supra* note 321, at 528 (construing footnote 9 of *Stanley* to require that the unwed father be notified of custody and adoption proceedings), 544-45 (notice by publication may be the only reasonable way to notify many unwed fathers although the likelihood of actual notification via publication is remote). Barron's approach to notification is in line with the language of footnote 9 since Justice White referred to the availability of publication. *Stanley*, 405 U.S. 645, 657 n.9 (1972). Further, this approach is in line, as Professor Barron notes, with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which the Court said that a reasonable attempt at notice must be made, but that actual notice need not be accomplished if it is futile because of the state's strong interest in the final resolution of legal disputes. *Id.* at 317. In *Mullane* the Court stated that publication was a reasonable attempt at notice of persons whose locations or identities were unknown. *Id.* Publication was also a reasonable attempt at notification of unlocatable or unknowable persons. *Id.* In the adoption situation, the state's strong interest in achieving the placement of children in stable and secure adoptive homes clearly precludes a requirement of actual notice when any attempt at such notice is futile. See Note, *Unwed Fathers*, *supra* note 57, at 98 (construing the Supreme Court cases to require notification), 129-31 (flexibility in forms of notice to accommodate state's interest in adoptive placement).

330. See, e.g., UNIF. PARENTAGE ACT § 24(f) (1973) (no need for notice if probable father's identity is unknown

C. Lehr and the Opportunity Interest

1. Lehr and Participation Rights

Consideration of what constitutes a reasonable attempt at notice is beyond the scope of this Article. Whether the state has some type of notice obligation, however, is central to the issue addressed by this Article, for if the state is freed from the obligation to make a reasonable attempt at notification, it perforce is freed from the obligation to consider the substantive interests of the unwed father in the proceeding

and notice unlikely to be achieved by publication); CAL. CIV. CODE § 7017(f) (West 1983) (notice only to identified fathers; publication not required); Barron, *supra* note 321, at 545 (decision not to attempt notification, even via publication, should be left to discretion of the judge when the father is unknown); Bodenheimer, *supra* note 121, at 62–64 (footnote nine's reference to notice by publication was dictum; no attempt at notice of the unknown father should be required in some circumstances); Note, *Strange Boundaries*, *supra* note 57, at 530 ("reasonable to permit self-information as the unknown putative father's sole means of notice").

The first step in the analysis leading to these conclusions is *Mullane's* statement that actual notice is not always a constitutional requirement, but that the requirement is to make a reasonable attempt at notice. 339 U.S. 306, 314–15 (1950). What is reasonable depends on a balancing of the individual's interest in notice against the state's interest in resolving the particular dispute. *Id.* at 314. Whatever balance may be struck in a particular situation, the notice requirement of procedural due process will not be construed to "place impossible or impractical obstacles" in the way of final resolutions of legal disputes. *Id.* at 313–14. In *Mullane* the Court used that line of reasoning as a justification for publication (which is essentially futile), however, rather than as a justification for no attempt at notice. *Id.* at 309.

The second step taken by the commentators is to refer to the other interests affected by requiring notice by publication and employ a balancing process that results in no requirement of notice or any attempt at notice in some circumstances. See Barron, *supra* note 321, at 536–54; Bodenheimer, *supra* note 121, at 63; Note, *Strange Boundaries*, *supra* note 57, at 523–27. The unique interests that these commentators put forward as weighing against the unwed father's right to notice are (1) the mother's privacy interest both in not identifying the father and in not having her name included in a publication of notice; (2) the child's interest in not being publicly declared illegitimate; and (3) the state's interests in facilitating adoption without the burden of having to make futile notification attempts, in not having to force the mother to identify the father, in not putting the mother's name in the published notice, and in not having to publish the child's name as part of the notice. See Barron, *supra* note 321, at 536–54; Bodenheimer, *supra* note 121, at 63; Note, *Strange Boundaries*, *supra* note 57, at 523–27.

It seems to this author that *Mullane* stands for the proposition that, individual interests aside, the state must make its best effort to notify, even if that means publication, unless that attempt will totally frustrate the state's interest in resolving the issues placed before it for resolution. The state's compelling interest in adoption is in achieving the permanent placement of the child. Clearly, an actual notice requirement would frustrate that goal in many cases. The question is whether a requirement of an attempt at notice would possibly frustrate that goal. If constructive notice requires publication of the mother's name, she might refuse to consent to adoption and still be unwilling or unable to provide a home for the child. The state might not be able to achieve its compelling goal of resolving the status of the child and giving him or her the stability and security of a permanent home. Further, constructive notice to an unknown father without the mother's name would surely be an exercise in futility. This seems to be the argument advanced in favor of not requiring any notice to a father whose identity is either unknown to everyone, including the mother, or unknown because the mother is unwilling to provide his name. Bodenheimer, *supra* note 121, at 62–65; Note, *Strange Boundaries*, *supra* note 57, at 527–31. Professor Barron would leave questions of notification by publication, including whether to include the mother's name in the publication, to the discretion of the trial judge in such instances. Barron, *supra* note 321, at 543.

This argument does not support a conclusion that publication may be dispensed with as the only reasonable way to notify an identified but unlocated father. The California statute provides that publication need never be required as a form of notice and that the court may, in its discretion, dispense with notice to an identified but unlocated father. CAL. CIV. CODE § 7017(f) (West 1983). The state's reliance on an argument that a mother might not consent to adoption if she knew the father's name, although not her own, were going to be published in conjunction with the adoption proceedings is very close to an argument that she might not consent if she knew that a known and located father was going to be notified by means of personal service or registered mail. If an unwed father has any right to notice, it is difficult to accept an argument that his right is outweighed by the state's interest in facilitating smooth adoptions by catering to the unwed mother's desire that the unwed father not be involved. See Note, *Strange Boundaries*, *supra* note 57, at 523 (interest of unwed custodial father in the adoption context is like the father's interest in *Stanley* because it entails the interest of a biological father in the "future companionship and enjoyment of his children"), 524–27 (because of the competing social interests in adoption and perhaps the mother's independent privacy interest, procedural due process does not require any notice or state attempt at notice to unidentified unwed fathers, whether lack of identity results from mother's own lack of knowledge or her refusal to identify).

of which he is not notified.³³¹ In *Lehr* the Court declared that the State of New York was not required to notify Jonathan Lehr of or allow him to participate in the proceeding leading to the adoption of his child.³³² Clearly, the state decree of adoption would permanently sever any opportunity for Lehr to establish a protectible relationship with his child.³³³ The Court considered Lehr to be a father who had failed to commit himself to his daughter, either by taking advantage of the process provided³³⁴ or by actually taking enough parental responsibility for her, given the circumstances, to evidence commitment and significant participation in the parental responsibilities.³³⁵ The state need not give such a father the power to veto his child's adoption, nor must the state even consider the father's actual or potential relationship with the child as a factor in determining whether adoption is in the best interests of the child.³³⁶

That conclusion rested, however, upon an assumption that the official evidence justified the determination that Lehr was an uncommitted father. Unlike the situation in *Quilloin*,³³⁷ the State of New York had little certain evidence that Lehr was such a father. There was no prior termination decree, official waiver of interest, or formal consent to the adoption.³³⁸ Without giving Lehr an opportunity to argue that he was a committed or participating father, the court hearing the adoption petition would have only the uncontroverted statements of the adoption petitioners, who, in Lehr's case, were certainly not neutral or even very reliable sources of information.³³⁹ Even if the official facts that Lehr had not taken advantage of the legal process to establish himself as interested³⁴⁰ and was not currently living with his daughter³⁴¹ were enough to establish a lack of a developed relationship,³⁴² they surely were not enough to

331. Certainly an adoption would proceed with ease if the only possible objector did not have to be informed of it. In the same way, legal resolution of a dispute over property would proceed with ease if one of two disputants did not have to be informed of the legal proceeding.

332. 103 S. Ct. 2985, 2987, 2994-95 (1983).

333. See *supra* notes 1-17 and accompanying text.

334. 103 S. Ct. 2985, 2987-88, 2995 (1983).

335. *Id.* at 2987, 2992-93. Lehr had not supported his child, had not had custody of her, had not participated in any way in her rearing, and had seen her only a few times in her life. *Id.* at 2987-89. As Justice White pointed out, Lehr consistently tried to take on responsibility for his child; his failure was not caused by his lack of effort, but by the mother's lack of cooperation. *Id.* at 2997-98 (White, J., dissenting).

336. See *supra* notes 201-14 and accompanying text.

337. 434 U.S. 246 (1978); see *supra* notes 201-14 and accompanying text.

338. See *supra* note 328 and accompanying text.

339. The mother and stepfather would plainly be interested in not having Lehr present in the adoption proceedings. Further, it appears that they did not inform the judge hearing the adoption petition of Lehr's continuing attempts to establish a relationship with the child since the court did not learn of Lehr's continuing interest until after he filed a paternity petition. 103 S. Ct. 2985, 2988-89 (1983). It was only when Lehr received notice of a change of venue motion for his paternity proceeding that he even knew of the adoption proceeding, *id.* at 2989, and the judge hearing the adoption proceeding entered the decree of adoption four days later, before Lehr could intervene. *Id.*

340. Lehr could have, but did not, register himself as a putative father who intended to claim paternity. *Id.* at 2987 n.4 (quoting Act of July 24, 1976, ch. 665, § 2, 1976 N.Y. Laws 1387, 1388-89 (current version at N.Y. Soc. SERV. LAW § 372-C (McKinney 1983))). Registration would have assured him of notice and participation rights in the adoption proceeding and would also have been official evidence of his interest in the child. *Id.* at 2987-88, 2988 n.5 (quoting Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980)).

341. An unwed father living with his child at the time an adoption proceeding is initiated is also entitled to notice and participation rights in the proceeding. *Id.* at 2987-88, 2988 n.5 (quoting Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980)).

342. These facts, along with the facts that Lehr's name was not on the child's birth certificate, he had not been married to the child's mother, he had not been adjudicated as the child's father, and the mother had not identified him as

establish conclusively that Lehr did not now want to take advantage of his opportunity as a biological father to establish a protectible relationship with his child.³⁴³ Actually, the judge hearing the case knew, when he issued the decree of adoption, that Lehr's petition for legitimation and visitation was pending in another court.³⁴⁴

The New York court, in effect, made two implicit determinations *en route* to its decision to decree the adoption without notifying Lehr or allowing his participation. It determined, first, without notice to or participation by Lehr, that Lehr did not have either an existing relationship with his child or a viable opportunity interest in establishing a relationship with his child. It determined, second, that Lehr need not be notified of or allowed to participate in the adoption of his child. The second determination does not conflict with the theory posited in this Article about constitutional protections that must be given to biological fathers when the state seeks to decree adoptions of their children.³⁴⁵ The first determination, however, is of great significance. It constituted a determination of a lack of any protectible interest without any notice to or participation by the father. It was a state denial of notice and participation to a father who, as far as the state was officially concerned, may have demonstrated his commitment to his child and participated in her rearing³⁴⁶ and who had done nothing to demonstrate conclusively that he did not want to take advantage of his opportunity as a biological father to establish a protectible relationship with his

the child's father in a sworn written document, were the only facts of which the trial court was obligated to take account. *Id.* at 2988. If any of these conditions had been met, Lehr would have been entitled to notice of and participation in the adoption proceeding. Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a (McKinney 1977)) (current version at N.Y. DOM. REL. LAW § 111-a (McKinney 1977 & Supp. 1983-1984)). The absence of any of these conditions might not even be enough to draw a conclusion of lack of a developed relationship. See *infra* notes 352-65 and accompanying text.

343. As Justice White pointed out in his dissent, there was a great deal of evidence on Lehr's side, unavailable to the court hearing the adoption petition, that tended to establish Lehr as a father who wanted to take his opportunity to act as a father to his child. He had lived with the mother until the birth of the child and visited the mother and child in the hospital every day. The mother openly acknowledged Lehr as the child's father. After the mother left the hospital, she concealed her whereabouts from Lehr. He "never ceased his efforts" to find the mother and child, and he offered financial assistance, but was threatened with arrest unless he stayed away. 103 S. Ct. 2985, 2997 (1983) (White, J., dissenting). He retained counsel and finally filed his paternity action. *Id.* at 2997-98.

If the issue were whether it is appropriate to disregard Lehr's interest in the adoption because his interest had been lost by his acts or omissions, the accuracy of that determination would seem to require consideration of his side of the story. That is basically Justice White's point in dissent: "Appellant [was] never afforded an opportunity to present his case." *Id.* at 2998 (White, J., dissenting).

Justice White's conclusion, however, rests on the assumption that Lehr's interest was of constitutional stature and remained viable. Under this assumption, the state was restrained by constitutional procedural rules in the way it determined to disregard Lehr's interest. *Id.* at 2998 (White, J., dissenting). It was on this point, however, that Justice Stevens, for the majority, disagreed. See *Lehr*, 103 S. Ct. 2985, 2990 (1983); see also *infra* notes 366-411 and accompanying text. See *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Court said, "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Id.* at 570-71 (emphasis added) (citation omitted).

344. 103 S. Ct. 2985, 2989 (1983).

345. If a biological father has neither a developed relationship with his child in the sense of having committed himself to custodial responsibility for the child and having exercised custodial responsibility to the fullest extent possible, nor a still viable interest in taking on those responsibilities, the first stage of analysis, *i.e.*, the consideration of the extent to which protecting the private interest will serve the constitutional values underlying protection for parental relationships, should result in a finding that a constitutional interest is lacking. The constitutional procedural protections of notice and hearing, therefore, would not be applicable. See *supra* subpart II(A) and notes 198-214 and accompanying text; see also *infra* notes 377-440 and accompanying text.

346. This was Justice White's point. 103 S. Ct. 2985, 2997-98 (1983) (White, J., dissenting); see *supra* note 343.

child.³⁴⁷ The United States Supreme Court, by upholding the New York scheme that allowed for such a determination, upheld that state denial.³⁴⁸

Lehr, then, alters the message most commentators have drawn from *Stanley*.³⁴⁹ The conclusion before *Lehr* was that the state must make a reasonable attempt to notify all unwed fathers of state action that will eradicate their interests in their children and must allow their participation at least until the state makes an official determination that they do not in fact have a protectible interest.³⁵⁰ The only exception seemed to be for situations in which the father's lack of a protectible interest had already been officially established. After *Lehr*, it is clear that in some circumstances the state constitutionally may omit to notify or allow participation by unwed fathers who never have been established officially as being without an interest and may even deny them participation in the preliminary stage of determining that they are without an interest.³⁵¹ The reasoning underlying *Lehr* must be examined to determine the reach of its holding.

2. *Lehr's Impact on Developed Relationships*

Justice Stevens took pains in *Lehr* to categorize Jonathan Lehr's actual relationship with his daughter as merely "potential," and thus unlike Caban's and Stanley's "developed" relationships with their children.³⁵² Regardless of any efforts Lehr may have made to turn his opportunity to establish a relationship into a developed relationship, he had not succeeded.³⁵³ In the more than two years of her life preceding the adoption, Lehr had had no "significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old."³⁵⁴ Justice Stevens did not rely on the evidence available to the court that decreed the adoption to draw this conclusion; rather, he considered the information presented by Lehr in his protest against the decree.³⁵⁵ Having categorized Lehr's actual relationship with his daughter as merely potential,³⁵⁶ Justice Stevens considered the constitutionality of denying notice and participation to a father with merely a potential relationship with his child.³⁵⁷ Justice Stevens explicitly disclaimed any

347. Lehr did fail to take advantage of the procedure provided for registering himself as a putative father intending to claim paternity of the child. 103 S. Ct. 2985, 2987-88 (1983). That omission is some evidence of lack of interest. On the other hand, he had filed a paternity and visitation petition before the adoption decree was entered, and the decreeing court had knowledge of his petition before it entered the decree. *Id.* at 2988-89.

348. *Id.* at 2993-94.

349. See *supra* notes 326-30, 340-48, and accompanying text.

350. See *supra* notes 326-30 and accompanying text.

351. See *supra* notes 340-48 and accompanying text.

352. 103 S. Ct. 2985, 2993 (1983); see *supra* notes 198-214 and accompanying text. In dissent, Justice White focused on the biological connection alone as giving rise to constitutional protection in all circumstances, regardless of whether that connection has "developed" into something else. 103 S. Ct. 2985, 2999 (1983) (White, J., dissenting).

353. He had not actually supported the child. 103 S. Ct. 2985, 2987 (1983). He had never lived with the child. *Id.* at 2988. He had not participated in her rearing in any way and had rarely even seen her. *Id.* at 2987. He had made no actual legal commitment to her, unless the filing of a paternity and visitation petition more than two years after her birth is evidence of a legal commitment. *Id.* at 2988-89. See *supra* subpart II(A) and notes 198-239 and accompanying text.

354. 103 S. Ct. 2985, 2994 (1983).

355. *Id.* at 2987-88, 2993-94.

356. *Id.* at 2993.

357. *Id.* at 2994.

implications the opinion might have for the notice and hearing rights of fathers with developed relationships.³⁵⁸

The New York statute that set out the categories of unwed fathers who would of right be notified and allowed to participate in proceedings leading to the adoptions of their children, however, easily could exclude not only fathers with potential relationships like *Lehr*, but also fathers with developed relationships close to the one Caban had with his children.³⁵⁹ For example, if *Lehr* had actually lived with his daughter and her mother after the child's birth and had participated in rearing the child during that time, it would be hard to distinguish *Lehr*'s actual relationship with his child from that of Caban. Yet, without registering as a father intending to claim paternity, placing his name on the child's birth certificate, or being identified by the mother as the child's father in a sworn document, *Lehr* still would not have been entitled to notice under the New York statute.³⁶⁰ Only a father living with the mother and the child at the time of initiation of the adoption proceeding would be entitled to notice without more official evidence of his relationship.³⁶¹ If a New York court failed to notify a father who had lived with his child in the past and had participated in all parental responsibilities for the child,³⁶² New York would be denying minimum procedural protections to a father with the most significant of parental relationships.³⁶³ The reasoning underlying *Stanley*, *Quilloin*, and *Caban* would militate against the constitutionality of such a result, and Justice Stevens' careful distinction of *Lehr*'s actual interest from developed ones also argues against such a result.³⁶⁴

Lehr deals only with the possibility of dispensing with notice to and participation by a father whose only claim is for the opportunity to develop a relationship. If *Lehr* had lived with his child, the application of the New York scheme to him would have been unconstitutional. As it was, *Lehr* had not taken any action that made his relationship with his child a developed one. His only complaint against the state court's decree of adoption without notice to him was that it cut off his opportunity interest without allowing him to participate. *Lehr* must be read as an opportunity

358. *Id.*

359. The statute provided for notice to any father who had been adjudicated to be the father of the child, had filed notice of intent to claim paternity, was named as the father on the child's birth certificate, was living with the child and mother at the time the adoption petition was filed, was identified formally by the mother as the father of the child, or was married to the child's mother within six months after the child's birth. *Id.* at 2988 n.5 (quoting Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980)).

Caban was identified as the father of his children on their birth certificates. 441 U.S. 380, 382 (1979). Nevertheless, none of the facts of his relationship with his children that seemed to give it constitutional significance equal to that of the mother's relationship would have entitled him to notice of their stepfather's adoption petition. He had lived with his children and their mother, but was not living with them at the time the petition was filed. *Id.*; see *supra* notes 98-137 and accompanying text.

360. Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389-90 (codified as amended at N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977)) (amended 1980), quoted in *Lehr*, 103 S. Ct. 2985, 2988 n.5 (1983).

361. *Id.*

362. These, of course, were the factors relied upon in *Caban*. See *supra* notes 98-137 and accompanying text.

363. See *supra* subpart II(A).

364. 103 S. Ct. 2985, 2991-94 (1983). "In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship We are concerned only with whether New York has adequately protected [an unwed father's] opportunity to form such a relationship." *Id.* at 2994.

case, and its only impact is on the opportunity interest of a father who has not developed a significant relationship with his child.³⁶⁵

3. *Lehr* and State Denials of Opportunity

In *Lehr* Justice Stevens explicitly stated that an unwed father, by virtue of his biological connection alone, has a special opportunity interest in establishing a relationship with his child.³⁶⁶ *Lehr* establishes the limitations of that interest, not its nonexistence. This subpart and the next one will discuss the limitations implied by *Lehr*.

Only when it is the state (or the federal government) that acts to deny an unwed father the opportunity to establish a significant parent-child relationship do federal constitutional considerations come into play.³⁶⁷ In *Lehr*'s situation, until the state denied him notice of and participation in the adoption proceedings that finally and permanently cut off any chance he might have had to act as a father to his daughter, the state had had no part in his failure to develop any relationship with his daughter during the two years of her life.³⁶⁸ It was the child's mother who had resisted all of his attempts to assume various parental responsibilities. Unlike *Caban* and *Stanley*,³⁶⁹ *Lehr* did not have the cooperation of his child's mother in his attempts to participate in the child's rearing.

If the state had offered *Lehr* no alternative means to establish a significant relationship with his child or at least signify his desire to do so, its denial to him of notice of and participation in the child's adoption would have involved the state in two ways. First, as was the actual situation in *Lehr*, it would have been a state denial of participation to an unwed father who had not developed a significant relationship with his child in the two years of her life. But second, and more important, it would also have been a state endorsement of the mother's unilateral power to preclude the father from establishing a significant relationship. Through such an endorsement, the state would be precluding the father from exercising his opportunity in the absence of cooperation by the mother. It was this second kind of state involvement that Justice Stevens was addressing when he said, "[I]f qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate."³⁷⁰

New York, however, did offer *Lehr* means wholly within his control for establishing a relationship with his daughter or at least for officially identifying himself

365. For a discussion of the methods by which a father can develop a significant relationship, see *supra* part II.

366. 103 S. Ct. 2985, 2993-94 (1983); see *supra* notes 324-25 and accompanying text.

367. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law

U.S. CONST. amend. XIV, § 1.

368. It was the mother's refusal to cooperate and her affirmative avoidance of *Lehr* that prevented his success. 103 S. Ct. 2985, 2997-98 (1983) (White, J., dissenting). The mother concealed herself and the child from him, refused to take his offered financial assistance, refused to let him see the child, and threatened him with arrest unless he stayed away. *Id.*

369. Both *Caban* and *Stanley* had lived with the mothers of their children and the children. *Caban*, 441 U.S. 380, 382-83 (1979); *Stanley*, 405 U.S. 645, 646 (1972). Obviously, the mothers of their children cooperated with them in their efforts to establish relationships with their children.

370. *Lehr*, 103 S. Ct. 2985, 2995 (1983).

as a father who wanted to establish a relationship.³⁷¹ If Lehr had taken advantage of any of those alternative means, he would at least have been notified of and allowed to participate in the adoption proceeding.³⁷² Thus, New York's failure to give Lehr notice of and participation in the adoption proceeding only constituted a state denial of opportunity to a father who, without any state action hindering him, had failed for two years to "grasp" his opportunity to turn his potential relationship with his child into a developed one or even to bring to the state's attention his desire to do so.³⁷³

Lehr explicitly does not purport to deal with the adequacy of the New York procedure as it might apply to a father with an already developed relationship with his child.³⁷⁴ Its rule probably would also not be extended to situations in which the father, unlike Lehr, was without any recourse, absent the mother's good will, either to establish a significant relationship with his child or at least to preserve his opportunity interest in doing so. These situations would involve the state in the mother's denial as soon as the state gave that denial effect. Actually, it is likely, given Justice Stevens' comment set forth above,³⁷⁵ that a state must either provide alternatives to maternal cooperation or not give any significance to failures that result from a lack of maternal cooperation. If the state does not provide an alternative, it must at least give the father notice of and participation in a proceeding in which the state may forever cut off his opportunity interest.³⁷⁶

4. *Lehr and the Timing of the Claim for Opportunity*

The principle of *Lehr* would not apply to a situation in which a state failed to notify a father with a developed relationship with his child of state adoption proceedings.³⁷⁷ The principle of *Lehr* also would not apply to a situation in which the state offered no alternative to a biological father who wanted to take on responsibility for his child but was frustrated by the mother because the state would then be involved in the mother's denial.³⁷⁸ Nevertheless, the principle of *Lehr* does apply to a father—like Jonathan Lehr himself—who has consistently and continually tried to take on responsibility for his child—even to the point of filing a paternity and visitation action that was pending when the adoption decree was issued.³⁷⁹

371. Lehr could have, at any time prior to the adoption, sought adjudication of himself as the father of his child. Act of July 24, 1976, ch. 665, § 3, 1976 N.Y. Laws 1387, 1389 (codified as amended at N.Y. DOM. REL. LAW § 111-a (McKinney 1977)) (amended 1980), *quoted in Lehr*, 103 S. Ct. 2985, 2988 n.5 (1983). But most significantly, he could have established himself as a person entitled to notice and participation merely by filing a simple notice of his intent to claim paternity of the child. *Id.* At the very least he had the means for keeping his opportunity interest alive.

372. *Id.* See *infra* notes 441-517 and accompanying text for a discussion of the substantive standards that must govern if the opportunity interest is still a viable one.

373. The term "grasp" is Justice Stevens'. 103 S. Ct. 2985, 2993 (1983). It should seem rather apparent at this point that Lehr was incredibly inept in his attempts to establish a relationship with his daughter. He went to the trouble of hiring a detective to search out the child and her mother, *id.* at 2997, but he never discovered the availability of self-registration. Further, even after he obtained an attorney, he still failed to take the simple step of registering himself as a person interested in claiming paternity of the child. *Id.* (counsel retained at least by early December 1978; adoption petition not filed until December 21, 1978; decree not entered until March 7, 1979).

374. See *supra* notes 352-65, and accompanying text.

375. See *supra* note 370 and accompanying text.

376. See *infra* notes 441-517 and accompanying text for a discussion of the substantive standards.

377. See *supra* notes 352-65 and accompanying text.

378. See *supra* notes 366-76 and accompanying text.

379. See *supra* notes 331-48 and accompanying text.

The principle's effect on *Lehr*, however, was of no concern to Justice Stevens because his only concern was that the New York statutory scheme reach those fathers with actually established relationships.³⁸⁰ In his words, the New York scheme "automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children."³⁸¹ The scheme might be inadequate if the father's entitlement to notice were entirely within someone else's control³⁸² and if the scheme "were likely to omit many responsible fathers."³⁸³ It would not be inadequate if, as was the case in *Lehr*, it were likely to omit many fathers like *Lehr* who had failed to turn their opportunity interests into developed relationships. *Lehr*'s problem was not that he, a man with a significant constitutional interest in establishing a relationship with his child, was denied basic notice rights because he had not complied with a statute that included most fathers with significant constitutional interests like his. *Lehr*'s problem was rather that he, a man without a current, significant constitutional interest, was denied notice for failing to comply with a statute that does include most fathers who do have current, significant constitutional interests.³⁸⁴ The nature of *Lehr*'s interest is different from the nature of the interests of those fathers who are most likely to be reached by the New York notice procedures.³⁸⁵

Lehr's interest in his child required no special treatment by the state because it was no longer of any constitutional significance.³⁸⁶ *Lehr*'s interest was never transformed from the opportunity that is the right of every biological father into a developed parent-child relationship that is identified by commitment to and responsibility for the child. For more than two years, he had tried and consistently failed to grasp his opportunity to play an important part in his child's life. Consideration of the constitutional values served by the opportunity right leads to a conclusion that timeliness is required of parents who would grasp the opportunity, regardless of the blamelessness of the parent who, like *Lehr*, just does not grasp it in time.

Part II of this Article established the principle that the Constitution protects only the parent-child relationships of biological parents who have actually committed themselves to their children and exercised responsibility for rearing their children. That principle was derived in large part from a theory that the process of defining which relationships are constitutionally significant includes a consideration of the public interests served by protection. Parents who commit themselves to their children and take responsibility for rearing their children serve the fundamental public interest in assuring proper care for children.³⁸⁷ The underlying premise of part III is

380. See *supra* notes 352-76.

381. 103 S. Ct. 2985, 2994 (1983).

382. *Id.* at 2995; see *supra* notes 366-76 and accompanying text.

383. 103 S. Ct. 2985, 2994-95 (1983).

384. Thus, when Justice Stevens stated that the New York procedures adequately protected *Lehr*'s "inchoate interest in establishing a relationship with Jessica," 103 S. Ct. 2985, 2995 (1983), what the procedures protected was *Lehr*'s original interest in establishing a protected relationship with his daughter. He could have originally taken advantage of the procedures to establish such a relationship.

385. And, of course, it was Justice Stevens' identification of *Lehr*'s interest as being different in nature from the interests of other fathers that started the whole process. *Id.* at 2990.

386. See *infra* notes 441-517 for a discussion of the applicable substantive standards.

387. See *supra* subpart II(A). See generally *supra* part II.

that the biological connection itself gives biological parents a constitutionally significant interest in taking responsibility for their children—the opportunity interest.³⁸⁸ But one of the most basic reasons for protecting those parents who do commit themselves to their children and take responsibility for rearing the children requires that the opportunity be grasped quickly or not at all.

Children are not static objects. They grow and develop, and their proper growth and development require more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability.³⁸⁹ Only when their emotional needs are satisfied can children develop the emotional attachments that have independent constitutional significance.³⁹⁰ A child's need for permanence and stability, like his or her other needs, cannot be postponed. It must be provided early.³⁹¹ That need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child. The basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely. The opportunity is fleeting. If it is not, or cannot, be grasped in time, it will be lost. Any opportunity that *Lehr* may have had at the time of, or shortly after, the birth of his child was lost by the time he finally took official action to compel the child's mother to let him share in the rearing of their child.

The main significance of *Lehr*, then, is its indication that the opportunity interest of every biological father in establishing a constitutionally protected parent-child relationship is of constitutional significance for only a limited time. Nevertheless, what constitutes a limited time depends on the circumstances under which the state is acting.

When the state failed to notify Jonathan Lehr of the proceedings leading to his daughter's adoption, the child was already more than two years old.³⁹² When *Quilloin* tried to turn his potential relationship with his son into a developed one, the boy was more than eleven years old.³⁹³ The ages of the children were, of course, relevant to the issue of timeliness. In addition, however, the decree sought in both of the cases was adoption by the children's stepfathers with whom the children had lived in de facto parent-child relationships for a long time.³⁹⁴ In *Lehr* Justice Stevens referred to Jessica's relationship with her stepfather as an "established" one.³⁹⁵ In *Quilloin* Justice Marshall referred to the child's relationship with his mother and stepfather as a "family unit already in existence."³⁹⁶ In both cases, someone else had, in the absence of any state authorization, taken on the parental responsibilities that the unwed father had failed to assume. The children were living with their

388. See *supra* notes 294–325 and accompanying text.

389. GFS I, *supra* note 14, at 31–40; GFS II, *supra* note 14, at 3–14.

390. See *Lehr*, 103 S. Ct. 2985, 2993 (1983); see also *supra* subpart II(A) and notes 98–137 and accompanying text.

391. See GFS I, *supra* note 14, at 31–40; GFS II, *supra* note 14, at 3–14.

392. *Lehr*, 103 S. Ct. 2985, 2987 (1983).

393. *Quilloin*, 434 U.S. 246, 247 (1978).

394. *Lehr*, 103 S. Ct. 2985, 2987 (1983) (21 months); *Quilloin*, 434 U.S. 246, 247 (1978) (more than nine years).

395. 103 S. Ct. 2985, 2995 n.22 (1983).

396. 434 U.S. 246, 255 (1978).

stepfathers; the stepfathers were presumably participating in the children's rearing, contributing to their support, giving them guidance and discipline, and establishing the emotional attachments that arise from such close association.³⁹⁷ When the state was finally asked to validate those existing parent-child relationships,³⁹⁸ not only had a great deal of time passed since the children's births, but a great deal of time had passed since others had independently stepped into the fathers' positions.

The father's opportunity interest is of limited duration as a constitutionally significant interest because of the child's need for early permanence and stability in parental relationships. That need is a part of the constitutional values to be taken into account in defining a constitutionally significant interest.³⁹⁹ In both *Lehr* and

397. In short, the stepfathers were performing all the "duties" that give rise to the "rights" of biological parents. See *supra* subpart II(A). See generally *supra* part II.

398. Each stepfather filed a petition to adopt the child. *Lehr*, 103 S. Ct. 2985, 2987 (1983); *Quilloin*, 434 U.S. 246, 247 (1978). By the adoption decree the state would validate the relationships. See *supra* notes 1-17 and accompanying text.

399. See *supra* notes 387-91 and accompanying text.

Among other commentators who have focused on the child's needs for both an early development of a parent-child relationship and maintenance of the relationship once it has begun, regardless of whether the relationship is with a biological parent and regardless of whether the child's biological parents are fit, are the following:

(1) Authors Goldstein, Freud, and Solnit, in both of their books, advocate maintenance of and legal autonomy for a child's relationship with a "psychological parent" who "wants" the child. GFS I, *supra* note 14, at 20-23, 53-64; GFS II, *supra* note 14, at 3-14. A "psychological parent" is one who, "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." GFS I, *supra* note 14, at 98. A "wanted child" is one "who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her." *Id.* According to Goldstein, Freud, and Solnit, when the original placement decision is made, the critical goals are early placement of the child with parents, whether biological, adoptive, or foster, who want to and will be the child's psychological parents, *id.* at 17-23, 40-49, 53-64; GFS II, *supra* note 14, at 3-14, and maintenance of the psychological parent-child relationship once it has developed. GFS I, *supra* note 14, at 31-40; GFS II, *supra* note 14, at 3-14. For Goldstein, Freud, and Solnit, then, the parental "right" involved in disputes over the custody of children is the "right" of those with whom the child is placed to become his or her psychological parents and the "right" of the child's psychological parents to maintain their relationship with the child. GFS II, *supra* note 14, at 3-14. Any "opportunity interest" belongs to whomever the child happens to be placed with at birth. *Id.* This theory neither supports nor denies recognition of a legal right in biological parents to become the child's psychological parents, but it does deny recognition of a legal right in biological parents to supplant others who have already become the child's psychological parents.

The Court, in its development of the constitutional theory of parental rights, has given attention to the early development of emotional bonds between a child and a committed adult caretaker. See, e.g., *supra* notes 27-61, 389-98, and accompanying text. Indeed, in *O.F.F.E.R.*, 431 U.S. 816, 844 n.52 (1977), the Court explicitly referred to Goldstein, Freud, and Solnit. The Court did not, however, recognize a "psychological parent" theory as part of constitutional theory; rather, it focused on "the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." *Id.* For the Court, the pertinent point for the legal status of children and parents is the fact, whether psychological or sociological, that emotional bonds do develop between children and those who are committed to caring for them and do care for them. The Court has also emphasized the protection to be given to biological parents who have developed emotional bonds with their children. See, e.g., *id.* at 844-46; see also *supra* subpart II(A). Finally, the Court has certainly supported the maintenance of the relationship between a biological parent and the child for whom he or she has exercised custodial responsibilities even after someone else has assumed the "psychological parent" role. See, e.g., *supra* notes 98-137 and accompanying text. This author is less confident than Goldstein, Freud, and Solnit of the law's (or the psychologists') ability to make a certain decision about where the "psychological" parent-child relationship lies when the child has moved from one caretaker to another, and it may be that the Court is also uncertain. See R. MNOOKIN, *supra* note 34, at 476-79.

This Article assumes that emotional bonds do develop between a child and a committed caretaker who exercises custody in the fullest sense. See *supra* subpart II(A). Those emotional bonds are a critical factor in the definition of a constitutional right in biological parents to maintain their relationships with their children. The biological relationship also is itself of constitutional significance, however, because it is biological parents who have a constitutional interest in the opportunity to develop relationships with their children.

(2) Professors Ketcham and Babcock rely on the theories of Goldstein, Freud, and Solnit in positing a "Basis II" for involuntary termination of parental rights. Ketcham & Babcock, *supra* note 57, at 549-52. Thus, when a "natural parent

Quilloin the child's needs were met by another before the natural father succeeded in taking on responsibility for his child.⁴⁰⁰ In other situations, however, the child may be without permanent and stable parental relationships when the state is asked to act. For example, when a natural mother formally consents to the adoption of her child by strangers, whether the child is an infant or an older child, the effect of her consent is legal authorization of the placement of the child with a new set of parent figures, not the validation of an already existing parent-child relationship.⁴⁰¹ Protection of the

is not participating in a psychological parent/child relationship and when the child has established a psychological parent/child relationship with the person seeking to adopt [the child]," *id.* at 550, the child's great need for validation of his or her existing relationship and the concomitant reduction of the parent's rights in the child that results from the lack of an ongoing psychological relationship justify a termination of any legal relationship between the natural parent and the child, *id.* at 540-42. The Ketcham and Babcock article does not try to reconcile the psychological parent concept with the constitutional protection traditionally given to natural parents. See *supra* subpart II(A) and notes 389-98 and accompanying text.

(3) Professor Chemerinsky relies on Goldstein, Freud, and Solnit and on Ketcham and Babcock to conclude that maintenance of an existing psychological parent-child relationship gives the state the kind of "compelling justification necessary to interfere with a parent's constitutional right to raise his or her child." Chemerinsky, *supra* note 285, at 109-10. For Professor Chemerinsky, a natural parent's liberty interest in raising his or her children is not defined by whether he or she has established the emotional bonds that develop during the exercise of custodial responsibility. Rather, the liberty interest of a natural parent in raising his or her children exists regardless of whether he or she is actually raising the children, but is not weighty enough to prevail against the state's interest in maintaining an already existing psychological parent-child relationship between the child and someone else. The parent's interest fails at the second stage of the analysis. See *supra* notes 58-64 and accompanying text. This Article, in contrast, initially approaches the problem at the first stage of analysis, *i.e.*, the first task is the definition of the natural parent's interest as a constitutionally protected one against which the state can prevail only upon compelling justifications. See *id.* That approach appears to be the one taken by Justice Stevens in *Lehr*, 103 S. Ct. 2985 (1983). See *supra* notes 201-14, 331-98, and accompanying text.

400. When the relationship between natural parent and child has been disrupted or has never been established, Goldstein, Freud, and Solnit advocate placement with or maintenance of the child's relationship with that person or those persons who are committed to exercising all the parental responsibilities for the child, especially the provision of the psychological bond that arises between the child and his or her caretaker. GFS I, *supra* note 14, at 31-64. This view is in effect the one adopted in the text as the constitutional theory underlying a case like *Lehr*. See *supra* note 399.

401. In such circumstances, the mother, who would presumably have a protected relationship with an older child by virtue of having been associated with the child throughout the child's life, and who would also probably have a protected relationship with an infant by virtue of her pregnancy and close association with the child at birth and shortly thereafter, see *Caban*, 441 U.S. 380, 404-07 (1979) (Stevens, J., dissenting), would be giving up her interest and, therefore, her relationship with the child should be considered no further in the adoption process. See *supra* notes 1-17 and accompanying text for discussion of effect of consent to adoption decree. See *infra* notes 446-58 and accompanying text for further discussion of this problem.

It is important to keep in mind, however, that not all adoptions are with strangers to the child. For example, the mother's consent may be to adoption by caretakers with whom the child has lived for a long time. Further, while adoptive placement may be with strangers, by the time the decree is entered, the adoptive parents may be "strangers" no more. For example, in *W. E. J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), by the time the father's claim for an opportunity to act as a father to his child was decided by the appellate court, the child had been with the "stranger" adoptive parents for the entire 16 months of his life, except for a few days after his birth. See *infra* notes 470-86 and accompanying text for a discussion of this kind of situation.

When the mother formally consents to the adoption of her child, whether the adoption is a private one or through an agency, the state immediately becomes involved in the process because of its *parens patriae* interest in assuring that children without their natural protectors are being protected. See generally H. CLARK, *supra* note 9, §§ 18.1, .3, .4, .8.

Thus, in Arizona, a parent may consent to adoption by a specific private person or to placement for adoption by a state agency or by a state authorized agency. ARIZ. REV. STAT. ANN. § 8-107(D) (Supp. 1974-1983). If the parent places the child with a private couple and consents to their adoption of the child, the adoptive couple must either be certified by a state court as acceptable to adopt children, *id.* § 8-105(A), or petition the state court within five days of receiving custody of the child for permission to retain custody pending such certification, *id.* § 8-108(A). Further, before the adoptive parents can petition to adopt the particular child, a certificate of their acceptability to adopt that child must be issued by the state court. *Id.* §§ 8-105(D), (G), (I), 8-109(A)(2). If the placement is to be made by an authorized private agency or a state agency, both certificates of suitability to adopt are still required, but an order allowing for custody pending such certification is unnecessary. *Id.* § 8-108(C)(4). In that event, however, the state, either through its agency or through a private agency under strict statutory and administrative guidelines, will be making the placement. See *id.* §§ 8-101(2), -105(A), -107(D)(1), -108(C)(4); see also *id.* § 8-503 (duties of the Arizona State Department of Economic Security

father's opportunity interest in such circumstances would not run afoul of the public value in early permanence and stability because there would be no present permanence and stability. Protection of the father's opportunity interest, on the other hand, assuming his willingness to take on all of the parental responsibilities, including providing a home for the child,⁴⁰² would assure permanence and stability for the future. Under these circumstances, the father's opportunity interest, provided he has not otherwise defaulted,⁴⁰³ should still be considered of constitutional significance because protection of his interest would not disserve any of the public values that justify protection.⁴⁰⁴ Those values would have been best served by early and permanent custodial care,⁴⁰⁵ but when maintenance of the early care is no longer possible, the next best choice must be made.

Whether the natural father's interest has lapsed because of passage of time, then, depends on the circumstances in which the state is acting. The time limitation *per se* applies only when another man has independently taken on the responsibilities of fatherhood for the child and asks the state to validate an already existing relationship. If the mother of a child consents to the child's adoption by strangers, the state still is required under the principles of *Stanley*,⁴⁰⁶ unaltered by the *Lehr* opinion, to notify and allow participation by a natural father who, like *Lehr*, has done nothing to evidence officially a waiver or loss of his interest in his child.⁴⁰⁷ Failure to attempt to notify a father in this circumstance under a scheme like New York's should be unconstitutional even after *Lehr*.

In his dissent to the *Lehr* opinion, Justice White took issue with Justice Stevens for engaging in balancing to determine whether Jonathan *Lehr*'s interest in his child was entitled even to minimal procedural protections.⁴⁰⁸ Justice Stevens, however, was not balancing a plainly identified constitutional interest against various opposing state interests. Rather, he was balancing the basic private and public values that underlie a determination of whether the interest has any constitutional significance.⁴⁰⁹ The constitutional rights of parents are inextricably tied up with the parents' performance of constitutional duties.⁴¹⁰ A claim for opportunity is not different from any other parental claim; its viability as a constitutional claim depends on whether it

(DES) regarding the supervision and licensing of child welfare agencies like private adoption agencies); ARIZ. R. ADMIN. P. 6-5-6901 to 6-5-6908 (standards governing DES in its licensing and supervision of private agencies). The only other exceptions for the custody order of § 8-108 are placements with close relatives or spouses of natural parents. ARIZ. REV. STAT. ANN. § 8-108(C)(1)-(2) (1974).

The discussion above demonstrates the involvement of the state in the adoption process from its initiation by means of the formal consent of the mother, through placement with potential adoptive parents, to issuance of a decree of adoption. Parents may informally arrange for the care of their children by others, but when they intend the arrangement to be validated as an adoption, the state becomes involved at the very beginning of the process.

402. See *infra* notes 412-40 and accompanying text.

403. See *id.*

404. See *supra* subpart II(A) and notes 294-325 and accompanying text.

405. See *supra* notes 386-91 and accompanying text.

406. See *supra* notes 294-325 and accompanying text.

407. See *supra* notes 337-48 and accompanying text.

408. 103 S. Ct. 2985, 2997-99 (1983) (White, J., dissenting).

409. See *supra* notes 57-64 and accompanying text. Justice White would define the constitutional interest as that of any biological father in his child, whether or not the relationship is developed. 103 S. Ct. 2985, 2999 (1983) (White, J., dissenting).

410. See *supra* subpart II(A).

accords with the values that justify protection for parents. Blood gives the father an absolute first chance to perform the constitutional duties. If he fails, regardless of his blamelessness, the critical requirement of stability for the child precludes a second chance.⁴¹¹

D. *The Opportunity Interest After Lehr*

1. *When Does a Father Fail to Grasp His Opportunity?*

After *Lehr*, then, the opportunity interest that belongs to a natural father by virtue of his biological connection alone may lapse over time if the child's stepfather voluntarily assumes full custodial responsibility for the child.⁴¹² As long as the state did not play a part in the original assumption of responsibility by the stepfather,⁴¹³ it need not even attempt to notify the natural father of its ultimate validation by adoption of the relationship between the child and the stepfather. But *Lehr* leaves intact most of the implications in the language of footnote nine of the *Stanley* opinion.⁴¹⁴ When the state has no official evidence, such as prior termination, consent, or waiver, that a biological father has lost his opportunity interest, and the state may not assume from the combination of passage of time and assumption of parental responsibility by another that the father's interest has lapsed, the father's biological connection alone requires the state to notify him of proceedings in which it may irrevocably cut off his opportunity to turn his potential relationship into an actual one.

The opportunity interest is constitutionally protected only to the extent that the biological father who claims protection wants to make the commitments and perform the responsibilities that give rise to a developed relationship because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects.⁴¹⁵ He has no constitutional protection for his opportunity to do anything less. If it is officially established that he merely has sought or is seeking to maintain his biological connection or to visit the child occasionally or to do anything else short of full assumption of the parental responsibilities that are open to him, the state may take official notice of his failure to grasp his opportunity to take on full responsibility for his child and need pay no more attention to his interests.⁴¹⁶

This official finding of a failure to grasp the opportunity can be made under several rubrics even in the adoption context. The failure may already have been officially established by prior adjudication, formal consent, or waiver.⁴¹⁷ Otherwise,

411. The message of *Lehr* is that the father may lose his chance even though he has not been at fault in any way. See *supra* notes 366-407 and accompanying text. The same effect may occur even if the relationship is an already developed one, see *supra* notes 215-92 and accompanying text, although that effect will occur at the second stage of analysis when the state's interests are being weighed against what is concededly an interest of constitutional significance. See *infra* notes 441-517 and accompanying text.

412. See *supra* notes 377-411 and accompanying text.

413. See *supra* notes 366-76 and accompanying text.

414. 405 U.S. 645, 657 n.9 (1972); see *supra* notes 294-330 and accompanying text.

415. See *supra* part II.

416. Emphasis is placed on the taking on of all responsibilities *that are available to him* because of the possibility that he may be willing to do everything possible and still not be able to develop a relationship of the highest constitutional significance. See *supra* notes 215-92 and accompanying text.

417. Thus, in Arizona, a parent who formally consents to his or her child's adoption or whose parental rights have been terminated in a prior adjudication need not be considered further in the adoption process. ARIZ. REV. STAT. ANN.

in the absence of a *Lehr* situation,⁴¹⁸ a finding of a father's failure to grasp the opportunity may be made only after a reasonable attempt to notify the affected father of his opportunity to participate.⁴¹⁹ After those prerequisites, the father, upon appearance, may be found to be a father whose opportunity interest has lapsed because of passage of time and circumstances. He, like *Lehr*, would have no constitutionally significant opportunity interest.⁴²⁰ The state would not have to consider his interests in its decision whether or not to decree the child's adoption or to declare the child free for adoption.

The state would have an alternative for dealing with a father like Quilloin. Quilloin let eleven years pass before he tried to make a binding commitment to his son and assume responsibility for the boy.⁴²¹ In the meantime, the boy's stepfather took on all the attributes of a father to the child.⁴²² Quilloin, like *Lehr*, may be perceived as a father whose opportunity interest has lapsed and, therefore, who need not be considered. On the other hand, Quilloin, like most fathers in that kind of situation, could not be perceived as blameless. No one, including the child's custodial mother for a long time, had ever prevented Quilloin from showing his commitment to his son by regularly supporting him, regularly visiting him, and acting as a father to him to the fullest extent possible under the circumstances.⁴²³ In constitutional terms, Quilloin voluntarily disregarded his parental responsibilities to his child. That kind of disregard constitutes a form of abandonment,⁴²⁴ not of an already established relationship, but of a potential one. Nothing in any of the Supreme Court cases announcing protection for established parent-child relationships and implying protection for the opportunity to establish a parent-child relationship precludes a state from terminating either a relationship or an opportunity to establish one for the kind of unfitness demonstrated by abandonment.⁴²⁵ Various members of the Court have implied that in the adoption context the state might use stricter standards of abandonment.⁴²⁶ Logically, such standards could certainly include any conscious

§§ 8-106(A)(1) (necessity for parental consent in general), -106(A)(1)(b) (no need for consent if prior judicial termination), -107 (time and contents of formal consent) (Supp. 1974-1983).

418. See *supra* subpart III(C).

419. See *supra* notes 414-16, 294-330, and accompanying text.

420. See *supra* subpart III(C).

421. *Quilloin*, 434 U.S. 246, 249 (1978); see *supra* notes 201-14 and accompanying text.

422. 434 U.S. 246, 252, 255 (1978); see *supra* notes 201-14 and accompanying text.

423. See *supra* notes 201-14 and accompanying text.

424. See, e.g., *In re Juvenile Action No. S-624*, 126 Ariz. 488, 616 P.2d 948 (Ariz. Ct. App. 1980) (appropriate test for abandonment is whether the conduct of the parent implies a conscious disregard of obligations owed by a parent to a child). See generally H. CLARK, *supra* note 9, § 18.5. The Arizona abandonment ground for termination provides that the relationship may be terminated if

the parent has abandoned the child or . . . has made no effort to maintain a parental relationship with the child.

It shall be presumed the parent intends to abandon the child if the child has been left without any provision for support and without any communication from such parent for a period of six months or longer. If in the opinion of the court the evidence indicates that such parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by such parent.

ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1974-1983) (text of section effective Sept. 1, 1985).

The purport of the text is not to fit the constitutional theory into the terms of such a state statute, but to provide a constitutional base for expansion of state grounds for abandonment if states choose to do so. See H. CLARK, *supra* note 9, § 18.5. After *Quilloin*, 434 U.S. 246 (1978), a state probably could find, without federal constitutional difficulties, that a father like Quilloin has abandoned his child.

425. See H. CLARK, *supra* note 9, § 18.5; see also *supra* notes 1-32 and accompanying text.

426. See, e.g., *Lehr*, 103 S. Ct. 2985, 2996-97 (1983); *Caban*, 441 U.S. 380, 392 n.11 (1979).

disregard of the opportunity to do everything possible to develop a fully protectible relationship with one's child.⁴²⁷ A father like Quilloin, under a properly drafted state statute, constitutionally could be held to have abandoned his child when he failed to take the opportunity that was freely available to him to do everything possible to act as a father to his child.

The abandonment that is effected by such failures to grasp the opportunity to develop a protectible parent-child relationship could be based on a failure to assume as much parental responsibility as possible under the circumstances. Quilloin informally acknowledged his son, visited his son sporadically, and occasionally contributed to the child's support, but Quilloin did not commit himself to the fullest extent of the parental responsibilities available to him.⁴²⁸ Justice Marshall stressed that Quilloin had never sought and did not seek, in response to the adoption petition, to become the boy's physical custodian.⁴²⁹ Quilloin's request for full custody, however, particularly at the time of the adoption petition, would have been futile.⁴³⁰ His failure to seek full custody, including physical custody, should not constitute a conscious disregard of the opportunity to take on the parental responsibilities that were his for the taking.

With that caveat, however, a state has several ways in which to structure a constitutionally valid abandonment ground for termination of the parental rights of an unwed father based on his conscious failure to grasp the opportunity available to him to act as a father to his child.⁴³¹ For example, in Texas, if a man knows of a woman's pregnancy and fails to support her during her pregnancy and remains apart from the child or fails to support the child after birth, any interest he may have in developing a relationship with the child may be terminated at the child's birth.⁴³² Because knowledge of pregnancy and willful failure to support would be established in a proper hearing,⁴³³ no constitutional concern prevents finding that such a father has aban-

427. The trouble with finding abandonment in a situation like *Lehr*'s is that he consistently tried to perform those acts which, if successful, would have put him on a par with Stanley and Caban. See *supra* notes 331-65 and accompanying text. If he had succeeded, he too would have had a developed relationship of constitutional significance. See *id.*

428. Quilloin, unlike *Lehr*, did not try to establish a protected relationship with his child, although he had ample opportunity to do so. See *supra* notes 150-214 and accompanying text.

429. 434 U.S. 246, 247 (1978).

430. See *supra* subpart II(D).

431. A viable distinction probably could be made between the mothers and fathers of newborn children that justifies different state treatment of them concerning abandonment and other grounds for termination. See *infra* notes 446-58 and accompanying text for discussion of that issue.

432. See TEX. FAM. CODE ANN. § 15.02(1)(H) (Vernon Supp. 1982-1983). Of course, if a state were to adopt such a ground for abandonment, it would be difficult to say that a father, like *Lehr*, for example, 103 S. Ct. 2985, 2997 (1983), who had lived with the mother during pregnancy had not developed at least something of a relationship with the child before the child's birth. See *infra* notes 446-58; see also *Lavell v. Adoption Inst.*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960) (found legitimation under a statute requiring the father to receive the child into his home and hold it out as his own). In *Lavell* the father had lived with the mother for a two-year period prior to the child's birth, but the mother left the father before the child's birth, refused to marry the father, and consented to the child's adoption by others shortly after the child's birth. If *Lavell* had been the law in New York at the time *Lehr* started his long attempt to get to know Jessica, his prospects might have been brighter.

433. Otherwise, the problems discussed *supra* in notes 328-51 and accompanying text would arise in this situation if the timeliness problem of *Lehr*'s claim, see *supra* notes 377-411 and accompanying text, is not present. The state has to give this father a chance to refute the charge unless he, like *Lehr*, has let his chance slip away because of lack of timeliness and the substitution of someone else as the child's "father." See *id.* Obviously, both abandonment and lack of interest may be present in the same situation, as in *Quilloin*. See *supra* notes 387-407, 201-14, and accompanying text.

doned his child by his voluntary failure to grasp his first available opportunity to act as a father to his child. Paternal responsibilities, like maternal ones, may begin before birth.⁴³⁴ A father who wants to act as a father to his child may be held to those responsibilities as well as the more familiar ones arising after birth. A father who willfully fails to take on such responsibilities may constitutionally be held to have abandoned his child in the same way that a father like Quilloin could be so held.

The state may also take official cognizance of the father's failure to grasp his opportunity when the father fails to take the opportunity offered in the proceeding in which his rights are being considered. Thus, under the Uniform Parentage Act,⁴³⁵ a natural father who has not otherwise been adjudicated or presumed to be the child's father⁴³⁶ and who appears in response to notification that the mother of his child proposes to consent to the child's adoption is given the opportunity to request custody of the child.⁴³⁷ Assuming that custody does not remain in the mother of the child,⁴³⁸ if he does not request custody, his interests are terminated.⁴³⁹ Regardless of whether any acts of abandonment have occurred in the past, such a father has declined to take on all the parental responsibility available to him, and the state constitutionally may take official notice of that failure.⁴⁴⁰

2. Substantive Standards

If an unwed father does manage to traverse all of the obstacles to his assertion of a viable opportunity interest, the state must not only give him the appropriate participation rights in proceedings leading to the termination of his interest, but it must also apply the appropriate substantive standard in the proceeding. The important issue is the current significance of *Stanley's* message that fathers "who desire and claim competence to care for their children" must be given "hearings on their fitness" to do so.⁴⁴¹ The substantive standard to be applied in the termination of an unwed father's opportunity interest in his child depends on the kind of relationship available to the father if his opportunity interest is honored.⁴⁴² First, regardless of the kind of relationship that is available, the father's interests, because they are of constitutional significance, must be considered in determining whether to free the child for adoption.⁴⁴³ His participation rights extend beyond a demonstration that he

434. See *supra* note 432. Marriage to the mother before birth seems to effect by itself the establishment of a developed relationship. See *Lehr*, 103 S. Ct. 2985, 2994 (1983); see also *supra* notes 174-85, 215-18, and accompanying text. If a father is perceived to be subject to parental responsibilities before birth, and he takes them on at that time, it is hard to conclude that he lacks the protected interest that Justice Stevens has posited for the unwed mother of a newborn. See *supra* notes 431-32; see also *supra* subpart II(A).

435. UNIF. PARENTAGE ACT (1973).

436. *Id.* § 24(b); see *id.* § 24(a) (presumptions of paternity), § 6 (cause of action for determination of paternity).

437. *Id.* § 24(d); see *id.* § 24(f) (requirements of notice).

438. The discussion in the text assumes that the consent is to adoption by strangers, so the father would be in a position otherwise to take on custody of the child. See *supra* subpart II(D).

439. UNIF. PARENTAGE ACT § 24(d) (1973).

440. Such a refusal would be the clearest instance of a biological father's refusal to "grasp" the opportunity offered him. See *supra* notes 412-16, 294-330, 198-214, 150-80, 32-64, and accompanying text. See UNIF. PARENTAGE ACT § 24 commentary (1973) (termination upon such a refusal to request custody conclusive evidence of a lack of interest).

441. 405 U.S. 645, 657 n.9 (1972); see *supra* notes 294-330 and accompanying text.

442. See *supra* subpart II(D).

443. See *supra* notes 215-47, 318-30, 337-48, and accompanying text.

has an opportunity interest. Like the father with a developed interest,⁴⁴⁴ he at least may argue "his opinion of where the child's best interests lie."⁴⁴⁵

The unwed father making an opportunity claim may have as much difficulty in making an equality claim for the same substantive treatment that the mother receives as does a father with a developed relationship that does not include all of the parental responsibilities.⁴⁴⁶ In *Lehr* Justice Stevens summarily dismissed *Lehr*'s claim for equal substantive treatment with the child's mother by focusing on the actual differences between *Lehr*'s relationship with the child and the mother's relationship with the child.⁴⁴⁷ The mother (and the stepfather) had had "continuous custodial responsibility for the child," while *Lehr* had had no "custodial, personal, or financial relationship" with the child.⁴⁴⁸ The distinction in *Lehr*, however, was between a parent with current, full custodial responsibility for the child and one who had no relationship with the child and had no protectible opportunity interest in developing one. A distinction in the treatment of such parents creates no problems for fathers who have viable opportunity claims.

When the mother of the child retains her interest in the child, however, the unwed father's claim for equality is analogous to the claim of a father with a developed relationship in a similar situation.⁴⁴⁹ The unwed father whose claim for the opportunity to assume full custody of his child is asserted against the claim of the child's mother will be subject to a best interests resolution of the dispute, even if his rights to custody are considered equal to the mother's.⁴⁵⁰

If the father with merely an opportunity interest seeks full custody against the claims of persons other than the mother and relies on a claim for equal treatment with other parents in situations similar to his, he also may have serious problems. Several Justices have distinguished between the interests of mothers and unwed fathers with mere opportunity claims, especially when the child is a newborn. In *Caban* the majority took special care to distinguish *Caban*'s claim from that of the father of a newborn.⁴⁵¹ Justice Stevens, in dissent, went much further. He focused on what he called the "obvious" distinction between unwed mothers and unwed fathers at and shortly after a child's birth.⁴⁵² He pointed out the mother's natural condition of having been responsible for the child before birth and shortly thereafter.⁴⁵³ For Justice Stevens, that difference in natural function justified a difference in the state's treatment of the mothers and fathers of newborns.⁴⁵⁴ One could say that the mother of a newborn already has a developed relationship with the child, while the father has only the opportunity to develop a relationship. Claims for substantive protection for

444. See *supra* notes 240-92 and accompanying text.

445. *Lehr*, 103 S. Ct. 2985, 2994 (1983).

446. See *supra* notes 225-92 and accompanying text.

447. 103 S. Ct. 2985, 2996 (1983).

448. *Id.*

449. See *supra* notes 225-92 and accompanying text.

450. See *id.*

451. 441 U.S. 380, 392 (1979).

452. *Id.* at 404-08 (Stevens, J., dissenting).

453. *Id.*

454. *Id.* at 407-08.

the opportunity interest, then, probably must be made independently of a claim for equal treatment with the mother. She will always, under this analysis, be in a different position from that of an unwed father.⁴⁵⁵

Further, Justice Stevens, dissenting in *Caban*, asserted that even fathers like Caban should be entitled to no more than protection against "arbitrary state action" as a matter of procedural due process and perhaps to no more substantive protection than protection against "official caprice."⁴⁵⁶ For him, as a matter of substantive due process, the state's use of a best interests standard satisfied the latter requirement in Caban's situation.⁴⁵⁷ In *Lehr* Justice Stevens implied only that the father's constitutional interest in his child entitles him to present his opinion of the child's best interests.⁴⁵⁸ Justice Stevens' opinion in *Caban* was a dissent, however, and the majority certainly did not agree with his substantive standard. Moreover, in *Lehr* Justice Stevens was not addressing the interests of fathers with viable opportunity claims. The constitutional analysis developed so far in this Article supports greater substantive protection for the opportunity interest, as do the majority opinions in *Stanley*, *Caban*, and *Quilloin*. The remaining discussion, then, addresses the issue of what substantive protection should be given to a father with a viable opportunity claim.

If the adoption sought is an adoption by strangers, the father's opportunity to establish a protected relationship must prevail in the absence of his unfitness.⁴⁵⁹ This conclusion derives from a consideration of the values served by protecting the natural father's interest. By definition, the relationship that he seeks to establish is a complete custodial relationship.⁴⁶⁰ When the adoption petitioners are strangers to the child, there is no one else with a constitutional claim to custody of the child.⁴⁶¹ The father's constitutional right as a biological father is to meet the basic custodial needs of his child. The state may not deny him that right unless he is incapable of fulfilling those needs. In these circumstances, the biological father with only an interest in the opportunity to take on custodial responsibility has an interest of as much constitutional significance as that of a father like Stanley or Caban. He stands ready and able to act as a father to his child in every important way, and his biological connection alone gives him the primary right to do so. Therefore, the state must use a fitness standard to deny him custody of his child.⁴⁶²

Unlike the father with an already developed relationship, the biological father with only an opportunity interest cannot claim that he, as opposed to the adoptive parents, is in the best position to serve the child's needs because he already has a

455. This conclusion might have implications for the discussion of conflicts between mothers and fathers over custody of their children. See *supra* notes 225-92 and accompanying text. See *supra* note 432 for discussion of a situation in which it would be hard for a state to deny equal treatment to a father.

456. 441 U.S. 380, 414 (1979) (Stevens, J., dissenting).

457. *Id.*

458. See 103 S. Ct. 2985, 2994 (1983).

459. See *supra* notes 11-16 and accompanying text for a discussion of the meaning of the term "unfitness." This standard appears to be the one posited by UNIF. PARENTAGE ACT § 24(d) commentary (1973).

460. See *supra* subpart II(A); see also notes 65-197, 215-92, and accompanying text.

461. See *supra* subpart II(A) and notes 294-325 and accompanying text.

462. See *supra* notes 412-40 and accompanying text.

relationship with the child.⁴⁶³ Nevertheless, the constitutional significance of his interest as a biological father who wants to take on full custodial responsibility for his child limits the state's substantive standards in the same way. The state's desire to use a best interests standard to find the best placement for a child is precluded by the constitutional decision that biological parents who are qualified to care for their children are protected in doing so.⁴⁶⁴ At the second stage of the analysis, legitimate state interests, like those in promoting legitimacy or adoption by "normal, two-parent" families,⁴⁶⁵ that might be used to argue for an open-ended best interests standard do not prevail over the conflicting interests of a biological father who is capable of and willing to take on full responsibility for his child.

Nevertheless, as is the case of a father with a developed relationship, in many adoption situations the father who is ready and able to assume the parental responsibilities cannot because the child's mother has been awarded legal custody of the child.⁴⁶⁶ Even though the natural father can commit himself to the child and take on various parental responsibilities, he, like the father who has already assumed such responsibilities, will never be able to live with the child on a day-to-day basis and establish the emotional attachments that are such an essential part of the protected parent-child relationship. Moreover, when the mother's husband is the petitioner for adoption, the stepfather, in all likelihood, will be the man with whom the child forms such attachments. When the natural father can never achieve a parent-child relationship of the highest constitutional significance and the stepfather may already have such a relationship or at least be in the process of forming one, the state may use a best interests standard to resolve the conflict between allowing the natural father to develop a relationship with his child and maintaining the relationship between the child and his stepfather.⁴⁶⁷

The substantive standard that must be applied to the two preceding situations is fairly easy to derive by comparing it with the standard that must be applied to analogous situations involving fathers with developed relationships. The natural father, by virtue of his biological connection, does have a constitutionally protected interest in the opportunity to develop a relationship with his child, but only the kind of relationship that is protected by the Constitution. If he is both able and willing to develop a protected relationship, the state may not prevent him, just as it may not prevent a father who already has such a relationship from maintaining it and turning it into a relationship of even greater significance.⁴⁶⁸ If the father is both able and willing to develop a protected relationship, but the mother's relationship with the child will probably prevent him from ever developing a parental relationship of the highest constitutional significance, the state may be able to prevent him from establishing a relationship if someone else is already supplying the missing elements.

463. See *supra* notes 265-79 and accompanying text.

464. See *id.*

465. *Caban*, 441 U.S. 380, 391 (1979); see *supra* notes 265-79 and accompanying text.

466. See *supra* notes 215-92 and accompanying text.

467. Recall that the best interests standard must take the fact of his relationship into account. See *supra* notes 232-59 and accompanying text.

468. See *supra* subpart II(B).

This conclusion is analogous to the conclusion that the state may be able to prevent the maintenance of a developed relationship if, because of the continuing presence of the mother, the relationship does not incorporate all the elements of the most carefully protected parent-child relationships and someone else is supplying the missing elements.⁴⁶⁹

A fairly common situation arises, however, that cannot be resolved by analogizing to situations involving fathers with already developed relationships with their children. When a mother relinquishes her child for adoption, the theory outlined above requires the state to determine whether the natural father's interests preclude adoption before it can decree adoption by others. That determination, however, may very well not be made before the child is placed with the prospective adoptive couple⁴⁷⁰ and, indeed, may not be made until many months after the child's placement.⁴⁷¹ The father may not know of the placement until months after it has occurred,⁴⁷² and when he does find out about it, his claim of interest in his child may not be resolved for a long time.⁴⁷³ In Arizona, for example, the statutes governing adoption provide for placement with adoptive parents pending the decree of adoption and resolution of the claims of a natural father.⁴⁷⁴ Such statutes promote the formation of a close relationship between the child and the adoptive parents during this period.⁴⁷⁵

Thus, the adoptive parents, with whom the child may have been placed soon

469. See *supra* notes 198-200, 215-92, and accompanying text.

470. In Arizona, for example, placement for adoption, certification of the adoptive parents as suitable for adoption in general and for adoption of the child in particular, and petition for adoption do not require prior consent or termination of the rights of both parents. ARIZ. REV. STAT. ANN. §§ 8-105, -108, -109 (1974 & Supp. 1974-1983). It is only the adoption decree that must be preceded by parental consent, termination of parental rights, or a waiver of those rights. *Id.* § 8-106(A)(1), (C). Precertification investigation of the child requires an inquiry and report about the parents' unfitness or their willingness to allow the adoption to take place, but not a final determination of either. *Id.* § 8-105(D).

All of these preliminaries to adoption seem to depend on a notion that legal custody of the child is obtained by the agency or adoptive parents either because the natural mother gives over custody to them (and it is validated by the court, see *id.* §§ 8-108, -105, -113) or they have been awarded custody through some other process. See, e.g., *id.* §§ 8-241(A)(1) (disposition of a child adjudicated dependent), -538(B) (disposition of a child whose parent's parental rights have been terminated). When a natural parent consents to the adoption of his or her child, that consent appears to constitute a relinquishment of the parental rights and responsibilities tied up in the concept of custody. See *supra* subpart II(A).

In the situation posed in the text, however, the other parent, the unwed father, has not consented, and his rights have not been terminated. He is ready and able to take over the care of his child, and he has, in these circumstances, a constitutional right to do so.

471. See, e.g., *W. E. J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), in which the child had been living with his adoptive parents for sixteen months, from the day after his birth, when the appellate court finally ruled on the natural father's claim for custody of his child. Arizona requires a six-month waiting period between the filing of a petition for adoption and the hearing on the petition. ARIZ. REV. STAT. ANN. § 8-113(C) (Supp. 1974-1983). Several months may pass between placement and the filing of the petition. See, e.g., *id.* § 8-105(G) (ninety day investigation period between placement and report on suitability of child for adoption by the persons with whom he or she is placed).

472. In Arizona, the father need not be notified of the placement until the petition to adopt is filed, ARIZ. REV. STAT. ANN. § 8-111 (Supp. 1974-1983), or a petition to terminate his parental rights is filed, *id.* § 8-533. In *In re Baby Girl M.*, 9 FAM. L. REP. (BNA) 2403 (Cal. Ct. App. Mar. 28, 1983), the father did not know of the pregnancy, the birth of the child, or the placement until two weeks after the child's birth.

473. See, e.g., *W. E. J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), in which the father responded to an adoption petition filed one week after the child's birth, but his claim was not finally resolved until sixteen months after the child's birth.

474. See *supra* note 470.

475. Such a relationship is of importance to the child's welfare. See *supra* subpart II(A) and notes 389-99 and accompanying text.

after his or her birth, will be performing all of those duties that, when performed by a natural parent, give rise to constitutional protections of the highest order. They will provide for the child's physical and material needs and will have the kind of intimate association with the child that produces the emotional attachments critical to a child's development. In addition, by virtue of their desire to adopt, they will offer the child the permanence and stability in care that the child needs for proper growth and development.⁴⁷⁶ The situation is similar to a stepparent adoption, but with two very important distinctions.

First, the relationship fostered by adoptive placement is the direct result of state facilitation.⁴⁷⁷ In a stepparent adoption, in contrast, the relationship is the result either of purely private arrangements or of a state resolution of a conflict between the mother and father, both of whom have equal constitutional interests in their child.⁴⁷⁸ Second, unlike a stepfather adoption in which the mother's interests play an important role, no private constitutional interest of equal stature stands in the way of the natural father's development of a complete custodial relationship with his child.⁴⁷⁹

When the court is finally ready to resolve the issue, what standard must it apply in this situation? On the one hand, the natural father, if he has not waived or abandoned his interest in assuming responsibility for his child, and if he is capable of and willing to take on all the parental responsibilities for his child,⁴⁸⁰ presumably

476. *See id.*

477. *See supra* note 470.

478. *See supra* notes 225-37, 366-76, and accompanying text.

479. *See id.*

480. The same rule applies under Arizona law, where courts have interpreted the statutory provision for waiver of parental consent in the child's interests to require a showing of fault, incapacity, or unwillingness to care for the child. *See supra* note 10.

In the discussion in note 10, *supra*, it was pointed out that although the Arizona adoption statute provides for dispensing with parental consent "when the court determines that the interests of the child will be promoted thereby," ARIZ. REV. STAT. ANN. § 8-106(C) (Supp. 1974-1983), that provision and earlier versions of it have been construed by the Arizona courts to require as a jurisdictional basis some kind of fault, incapacity, or unwillingness on the part of any parent (including an unwed father) that prevents the natural parent from assuming custody of the child or that would justify the court in denying custody to the parent. *See, e.g., Clark v. Curran (In re Appeal in Pima County, Adoption of B-6355 & H-533)*, 118 Ariz. 111, 575 P.2d 310, *cert. denied*, 439 U.S. 848 (1978). When a parent's unfitness does not stem from the parent's fault, the required jurisdictional finding can still be made by reference to statutes like Arizona Revised Statute § 8-201(11), which defines a "dependent child" as one who, among other things, is "[i]n need of proper and effective parental care and control and has no parent or guardian . . . capable of exercising such care and control" or "is not provided with a home or suitable place of abode." ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1974-1983).

In a situation like the one in the text, the Arizona Supreme Court has declined to rule that a child is "dependent" when the only apparent reason the natural father is not providing the child with support, care, and a home is that the adoption agency to which the mother has relinquished the child for adoption will not let him do so. *Caruso v. Superior Court*, 100 Ariz. 167, 412 P.2d 463 (1966). Thus, in *Caruso*, the trial court had no jurisdiction to make any further disposition of the child. *Id.* at 174, 412 P.2d at 467. *But see* *Natural Mother v. Adopting Parents (In re Adoption of Baby Boy)*, 106 Ariz. 195, 201, 472 P.2d 64, 70 (1970) (child properly found dependent because his mother was in prison and presently incapable of providing for the child, but her release was imminent); *see also Clifford v. Woodford*, 83 Ariz. 257, 320 P.2d 452 (1957) (in custody dispute between natural father and stepfather, "fitness" construed to require a consideration of the children's "best interests"). The *Clifford* reasoning could be carried over to terminations of parental interests in the context of adoption, although so far the Arizona courts have drawn a very strict line between custody decisions like the *Woodford* cases and decisions that permanently and irrevocably sever the legal ties between biological parent and child. *See Gowland v. Martin*, 21 Ariz. App. 495, 520 P.2d 1172 (1974). If the *Clifford* reasoning were carried over to a situation like the one in the text, where adoptive parents have established a close relationship with the child, then in Arizona state facilitation of the relationship between the adoptive parents and the child in derogation of the natural father's opportunity interest, *see supra* notes 366-76, 470-79, and accompanying text, would raise difficult questions of state denials of constitutional rights.

must be allowed to exercise those responsibilities. On the other hand, the child has benefitted from a developed relationship with adoptive parents, a relationship that has developed because the state has fostered it. Because of the state's facilitation, persons other than the father have performed the duties that ordinarily justify protection for the parent-child relationship. If the state decrees adoption because of the child's interests in remaining in his or her already established home, it will have unconstitutionally deprived the father of his opportunity to take responsibility for his child.⁴⁸¹ On the other hand, if the state denies the adoption petition and allows the father to take custody of the child, the child probably will be harmed.⁴⁸²

This problem cannot be solved by manipulation of the constitutional principle. It is the state that has created the dilemma, and the state could have provided for a quick resolution of the father's claims before the development of a relationship between the adoptive parents and the child. In that sense the situation is unlike the one in *Lehr*.⁴⁸³ *Lehr* had no protectible interest because someone else had taken on the parental responsibilities and also because the state had not facilitated the substitution.⁴⁸⁴ When the state has created a conflict between the father's interests and those of the child, resolution may be possible only in terms of the remedy available to the father. If a decree of adoption is entered, the father may not demand custody because of the

481. See *In re Baby Girl M.*, 9 FAM. L. REP. (BNA) 2403 (Cal. Ct. App. Mar. 28, 1983); *W. E. J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979); *Detrich v. Sheldon G. (In re Tricia M.)*, 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977); *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976), for an ongoing debate among the California appellate courts on the appropriate standard to apply under California's version of the Uniform Parentage Act, CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1984). Note that in California the custody decision takes on heightened importance because California's version of the Uniform Parentage Act apparently gives consent rights only to "presumed," and not merely adjudicated, fathers, and a presumption of paternity, in situations other than marriage or a semblance of marriage, arises only if the child lives with the father. *Id.* §§ 7004(a), 7017(a), (d), 224. In *W. E. J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), the majority overturned the lower court's decision in part because it had not used a best interests standard in responding to the natural father's claim for custody. *Id.* at 307-12, 160 Cal. Rptr. at 864-67. The custody issue is of particular importance in the California scheme, for only by receiving the child into his home and holding the child out as his own may an unwed father become a "presumed" father with the power to veto his child's adoption. CAL. CIV. CODE § 7004(a)(4) (West 1983). Even if he has been adjudicated the father under California Civil Code § 7006, his consent is apparently not required unless he has somehow been able to take the child into his home. *Id.* §§ 7017(d), 224. Thus, in *In re Baby Girl M.*, 9 FAM. L. REP. (BNA) 2403 (Cal. Ct. App. Mar. 28, 1983), another California appellate court declared that the unwed father must be given custody (and thus the status of a "presumed" father with power to consent) unless the transfer of custody to the parent would be harmful to the child. CAL. CIV. CODE § 4600(c) (West 1983). Even under the approach taken by the court in *Baby Girl M.*, however, the child's custody might remain with the adoptive parents. See *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976), in which consideration of harm to the child was held to include consideration of psychological harm. If the unwed father is denied custody on that ground, the state, by facilitating the early placement of the child with the adoptive parents without giving the father an opportunity to assert his claim in a timely manner, will be denying, as in the situation in the text, the father's constitutional right to take custodial responsibility for his child.

482. See *supra* notes 389-401 and accompanying text. In a situation like this, Goldstein, Freud, and Solnit would probably leave the child with his or her psychological parents. See GFS I, *supra* note 14, at 40-64, 35-37; GFS II, *supra* note 14, at 3-14. However, Goldstein, Freud, and Solnit set a time of twelve months before caretakers who want to continue caring for the child may seek to make their relationship legally permanent. GFS II, *supra* note 14, at 46. That timetable seems to reflect a notion that the child once lived with the natural parents, unlike the situation in the text, *id.*, and the timetable might be different for a child who had never lived with his or her natural parents and had thus only established a relationship with persons other than his or her natural parents. Goldstein, Freud, and Solnit believe that separation from committed caretakers is always harmful to a child, regardless of his or her age at separation. GFS II, *supra* note 14, at 9; GFS I, *supra* note 14, at 17-23, 31-37.

483. 103 S. Ct. 2985 (1983).

484. See *supra* notes 366-407 and accompanying text.

harm to the child,⁴⁸⁵ but the father should be able to pursue other remedies for vindication of his constitutional rights.⁴⁸⁶

A recent Texas case, *In re Baby Girl S.*,⁴⁸⁷ is the best example of a situation in which use of a best interests standard unconstitutionally denied a biological father his opportunity to develop a protected relationship with his child. Donald Kirkpatrick was the unwed father of a baby girl.⁴⁸⁸ Before the child's birth, Kirkpatrick tried to support the mother, tried to maintain contact with the mother, and offered to marry the mother.⁴⁸⁹ When all of these efforts failed and he learned that the mother planned to relinquish the child for adoption, he made plain his desire to raise the child himself, and he even deposited money with the Texas court for the child's support.⁴⁹⁰ The father was twenty-five years old at the time of trial and lived and worked on his family's Nebraska farm.⁴⁹¹ The mother described him as a "wonderful man . . . a good man, a hard worker . . ."⁴⁹² She also stated that he smoked, swore on occasion, did not keep his house clean, and was not of her religious convictions.⁴⁹³ The mother was sixteen and from the same Nebraska community as the father. Her parents refused to consent to her marriage to the father. With their assistance and encouragement, she went to Texas to give birth to the child and relinquished it at birth to a private adoption agency for placement with adoptive parents.⁴⁹⁴

Under Texas law, the unwed father was not a "parent" whose interests must be

485. See *supra* notes 389-401 and accompanying text.

486. The remedy would presumably arise under 42 U.S.C. § 1983 (1976). The statement in the text does not take into account all of the multitude of problems associated with such a claim. State action and immunity problems immediately come to mind. Discussion of the problems with that kind of remedy is beyond the scope of this Article. See *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir. 1982) (for purposes of a § 1983 action, a parent's right to retain custody is a "liberty" under the fourteenth amendment; question whether those standing in the place of parents have the same kind of interest; adequate state remedies preclude claim in this case).

The authorities cited *supra* note 285 and the discussion *supra* notes 389-401 and accompanying text focus on the extraordinary weight that must be given the interest (whether denominated as a state interest or as an independent interest of the child) in maintaining the child in the family relationship that he or she has already established. That focus, however, does not preclude a conclusion that the state may, by its facilitation of the development of such a relationship, deprive the natural father (or another parent) of his constitutional right to develop a relationship with his child. The child is a human being and may not be treated like a piece of property to be awarded to the prevailing party. Nevertheless, some means must be devised to deter state actors from depriving people of their constitutional rights.

487. 628 S.W.2d 261 (Tex. Civ. App. 1982), *vacated sub nom. Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983). The United States Supreme Court originally granted certiorari, 103 S. Ct. 784 (1983), but vacated and remanded upon being informed that the father might have recourse through Texas' involuntary paternity statute, TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1982-1983). 103 S. Ct. 1760 (1983). That avenue apparently has not been used previously by a Texas father, but it was suggested to the author last year by Professor Jack Sampson of the University of Texas at Austin School of Law. If an unwed father can use involuntary legitimation, he will be declared the father of the child upon proof of biological paternity. TEX. FAM. CODE ANN. § 13.08 (Vernon Supp. 1982-1983). The effect of such a finding is "to create the parent/child relationship between the father and the child as if the child were born to the father and mother during marriage." *Id.* § 13.09. In that event, the father would have the same rights to custody and consent to adoption that any other Texas parent has. See *id.* §§ 11.01(3), 12.02, 12.04, 16.03, 15.02. The Texas court, on remand, refused to determine the issue because it had not been raised at trial; thus, Kirkpatrick's claim has yet to be finally resolved. *In re Baby Girl S.*, 658 S.W.2d 794 (Tex. Civ. App. 1983).

488. Petition for Writ of Certiorari to the Supreme Court of Texas at 3, *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983).

489. *Id.* at 4-5. (The facts were all gathered from the trial transcript.)

490. *Id.* at 5.

491. *Id.* at 4-6.

492. *Id.* at 7.

493. *Id.*

494. *Id.* at 4.

considered in an adoption proceeding.⁴⁹⁵ His only chance appeared to be to petition for legitimation of the child under Texas' voluntary legitimation statute.⁴⁹⁶ If he were declared to be the child's father under that statute, he would be considered a parent with the same rights and duties as any other parent, including the rights to take custody of the child and to veto the child's adoption unless proved unfit.⁴⁹⁷ Under the legitimation statute, however, in the absence of consent by the mother, the trial court could declare paternity only if it found legitimation to be in the best interests of the child.⁴⁹⁸ At the hearing, the mother testified about the preceding facts and stated that she believed it was in the child's best interests to be adopted by "two Christian parents."⁴⁹⁹ The mother's father said that it would be an embarrassment to the family for the child to be raised in the small community where both families lived.⁵⁰⁰ On the other hand, Kirkpatrick stated, "All I can say is I love my daughter and I want her, and she's blood, and I just can't see letting her go."⁵⁰¹ The trial judge found that legitimation would not be in the child's best interests and that termination of the mother's rights and placement of the child for adoption would be in the child's best interests.⁵⁰² The Texas appellate courts upheld the trial court's determination, focusing on the facts that Kirkpatrick wanted to raise the child in his and the mother's hometown and that he had no "family relationship" with the child.⁵⁰³

Kirkpatrick's situation illustrates the effect of a best interests standard, even when a father has full notice and participation rights, in a contest between an unwed father and the state over the fate of a child whom the father wants to raise on his own and the state wants to place for adoption. There is surely no abuse of discretion in a decision that a child's interests would be better served through adoption by a couple who has undergone the rigors of state-supervised preadoption investigation⁵⁰⁴ than through placement with a concededly imperfect unwed father in a town in which everyone would know the circumstances of the child's birth. In Kirkpatrick's situation, however, while Kirkpatrick may not have been able to argue for equality of

495. See discussion of Texas law *supra* notes 10, 17. Under the Texas statutes, the father was notified of the process leading to the child's adoption apparently only because the agency sought to terminate the mother's rights on the strength of her consent. See Joint Appendix at 872, *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983) (trial court Findings of Fact and Conclusions of Law). An unwed father whose paternity has not been established is only entitled to notice of termination proceedings directed at the child's mother. TEX. FAM. CODE ANN. § 11.09(a)(8) (Vernon Supp. 1982-1983). But see *In re T. E. T.*, 603 S.W.2d 793, 797 (Tex. 1980) (implies that the unwed father has a right to notice and participation in proceedings affecting his potential relationship with his child), *cert. denied sub nom. Oldag v. Christian Charities*, 450 U.S. 1025 (1981). In other circumstances, consent to the state or an authorized agency appears to preclude the need for termination and thus the statutory requirement of notice to the father. TEX. FAM. CODE ANN. § 16.03(d) (Vernon Supp. 1982-1983).

496. TEX. FAM. CODE ANN. §§ 13.21-24 (Vernon Supp. 1982-1983).

497. See *supra* note 487 for effect of a declaration of paternity. TEX. FAM. CODE ANN. §§ 13.21(b), 12.01, 12.04 (Vernon 1975 & Supp. 1982-1983).

498. TEX. FAM. CODE ANN. § 13.21(c) (Vernon Supp. 1982-1983).

499. Petition for Writ of Certiorari to the Supreme Court of Texas at 6-7, *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983).

500. *Id.* at 7.

501. *Id.* at 5-7.

502. Joint Appendix at 85a-86a, *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983) (trial court Findings of Fact and Conclusions of Law).

503. 628 S.W.2d 261, 262 (Tex. Civ. App. 1982), *vacated sub nom. Kirkpatrick v. Christian Homes of Abilene, Inc.*, 103 S. Ct. 1760 (1983).

504. See *supra* notes 470-82 and accompanying text (discussion of Arizona process).

treatment with the thousands of single parents who already have custodial relationships with their children, his opportunity interest as a biological father should have prevailed over the state's desire to use a best interests standard.

A best interests standard does not adequately protect Kirkpatrick's interest in his child. A biological father has a constitutional interest in the opportunity to take on the full custodial responsibility for his child that is the basis for the substantial constitutional protection that custodial or once-custodial biological parents receive.⁵⁰⁵ The biological connection alone gives him this opportunity interest.⁵⁰⁶ The Texas court's mistake was in focusing on the lack of a current "family relationship" between the child and her father.⁵⁰⁷ Kirkpatrick had a constitutional right to establish a "family relationship." Constitutional protection for the opportunity extends only to those fathers who are able and willing to assume as much custodial responsibility as possible because the biological connection is significant only in combination with performance of custodial responsibilities and the emotional attachments that arise between child and custodian.⁵⁰⁸ Kirkpatrick, however, was willing and able to take on full custodial responsibility for his daughter. The opportunity interest may be limited when circumstances that are not the result of state manipulation have made it impossible for the father to take on full custodial responsibility, particularly when the mother has retained custody.⁵⁰⁹ In Kirkpatrick's situation, however, no current conflicting private interests of a constitutional stature equal to Kirkpatrick's prevented him from taking full custody of his child since the mother had declined to take custody of the child.⁵¹⁰ If permitted by the state, Kirkpatrick would meet the basic needs of the child.⁵¹¹ Unlike the *Lehr* situation, the interests of the mother in retaining custody of her child were not present.⁵¹² Further, unlike *Lehr*, passage of time had not resulted in someone else's assumption of the parental responsibilities.⁵¹³ Even if *Lehr* is read to limit protection of the opportunity interest to situations in

505. See *supra* subparts III(A)-(C), II(A).

506. See *supra* subparts III(A)-(B), II(A).

507. 628 S.W.2d 261, 262 (Tex. Civ. App. 1982), *vacated sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983).

508. See *supra* subpart II(A) and notes 412-16, 215-92, and accompanying text.

509. See *supra* notes 377-411, 215-92, and accompanying text.

510. See *supra* notes 215-39 and accompanying text for a discussion of potential conflict between a custodial mother and an unwed father. See also *supra* notes 446-58 and accompanying text for a discussion of the possible difference in the nature of the interests of the mother and the father of a newborn. Kirkpatrick's situation involved a mother who did not want to take on custodial responsibilities herself, so her interest was not one in custodial responsibility. Some of the authorities cited *supra* note 330 would extend paramount protection for the mother's right to privacy from her interest in not having her name revealed in published notice to her interest in disposing of the child in the way she thinks best—regardless of the father's desire to assume responsibility himself. Surely, the mother's right to control the destiny of her child does not prevail or even continue after she relinquishes her responsibilities and when a fit father wants to undertake them. In *Lehr* Justice Stevens referred to the mother's right to privacy as a state justification for not notifying fathers like *Lehr*, but the mother whose right to privacy was at issue in *Lehr* was a custodial mother whose husband had taken on all parental responsibility and wanted to adopt the child. 103 S. Ct. 2985, 2995 (1983). The mother in *Lehr* was not out of the picture. Further, the main privacy interest implicated in notice is the privacy interest in seclusion, not the privacy interest in untrammelled control. See *supra* note 330; see also Buchanan, *supra* note 37, at 598 n.290.

511. Under the theory developed in this Article, the constitutional analysis takes account of the needs of the child because those are the values served by the protection. See *supra* subpart II(A) and notes 389-407, 280-92, and accompanying text.

512. See *supra* notes 494, 446-58, and accompanying text.

513. See *supra* notes 377-411 and accompanying text.

which the claimant has taken advantage of prescribed procedures,⁵¹⁴ Kirkpatrick took advantage of the procedures. Finally, although the opportunity interest may be limited if the father abandons the child, even if the abandonment occurs before the child's birth,⁵¹⁵ Kirkpatrick never abandoned his opportunity. He tried to support the mother during pregnancy and tried to marry her, and when those attempts failed, he took advantage of the only means available to him to take on full responsibility for his child. He even attempted to support the child during the pendency of his legitimation petition.

Kirkpatrick's situation is precisely the one in which the biological father's opportunity to establish a full relationship with his child may not be denied just because it might be better for the child to live with someone else. The considerations that go into denominating a father's right as constitutionally protected preclude the state from using conflicting considerations to justify a best interests standard. Thus, the constitutional conclusion that a fit biological father like Kirkpatrick has a right to take on responsibility for his child itself prevents a state determination that children like Kirkpatrick's child are to be given into the care of those people whom the state considers best qualified. The state's interest in providing homes for the homeless cannot be a factor in a case like Kirkpatrick's. Only state interests like legitimation and provision of a "normal, two-parent home" remain as a justification for a best interests standard in this situation.⁵¹⁶ But those interests, standing alone, should not prevail. The proceeding in which the issue arose would have accomplished legitimation of the child. The "normal, two-parent home" justification is the only desirable condition that a father like Kirkpatrick cannot provide. The state's desire to factor in the provision of such a home was not enough to justify the use of a best interests standard in a situation in which a father who stood ready and able to turn a developed parent-child relationship into a fully custodial one opposed the state's use of a best interests standard in a situation involving adoption by strangers.⁵¹⁷ Even though the unwed father in Kirkpatrick's situation cannot rely on the protection given to an already established parent-child relationship, the state's preference for a conventional home for the child cannot prevail over the constitutional right of a fit and willing biological father to assume full custodial responsibility for his child and thereby to establish a relationship equal in every way to that of any other single custodial parent. The reasons for using a best interests standard are not significant enough to outweigh the substantial constitutional interests of a father like Kirkpatrick.

E. *Summary*

Constitutional protection for the biological connection between an unwed father and his child is quite limited. It consists only of protection for the opportunity to come forward timely and act as a parent in the whole sense to the child. The father's opportunity interest must be reconciled with the perhaps paramount interest of a

514. See *supra* notes 331-58, 366-76, and accompanying text.

515. See *supra* notes 412-40 and accompanying text.

516. See *supra* notes 265-79 and accompanying text.

517. See *id.*

custodial mother in the child. Time and circumstances may limit protectibility of the father's interest because the values that underlie protection require that the father take advantage of his opportunity early and completely. A protected opportunity interest belongs only to those fathers who are able and willing to take advantage of it. Biological fathers with only an opportunity interest probably cannot rely on equality claims, even when their children are newborns. Nonetheless, despite all of these limitations, the nature of the opportunity interest certainly precludes the state from denying it without a reasonable attempt at notice and hearing, and the interest almost certainly is of enough substantive weight to prevent a state's denial of it by use of a best interests standard in situations involving fathers like Kirkpatrick to whom none of the limitations apply.

IV. CONCLUSION

This Article has sought to establish a constitutional basis for protecting the interests of unwed biological fathers in establishing and maintaining relationships with their children. That basis has depended upon a consideration of the fundamental social values served by protection of parental rights and a conclusion that constitutional protection for unwed fathers extends only to those fathers with relationships that serve those fundamental social values. The only parental right that does not require simultaneous performance of parental obligations is the opportunity right to take up those obligations. That right indeed inheres in the biological connection, but it is limited in duration and will be lost whenever a father voluntarily fails to assume the parental obligations or involuntarily fails to assume them if the failure occurs after a long enough time.

The rights this Article has posited do not depend on claims by unwed fathers for equal treatment with other parents whom the state may favor. The rights derive, rather, from an independent consideration of the fundamental rights of all parents in their relationships with their children. Thus, the thesis of the Article has broader implications, for it could be used, perhaps, to limit the rights of some other groups of parents. Essentially, however, the message is that if an unwed biological father is willing and able to perform those functions that society has always deemed critical for the protection and development of children, the Constitution requires the state to allow him to do so initially and to continue doing so, in the absence of circumstances not of the state's own making.